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OUTLINES
OF
CONSTITUTIONAL LAW

BY

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TABLE OF CONTENTS.

PART I.—INTRODUCTORY.

CHAPTER	PAGE
I.—INTRODUCTORY DEFINITIONS	1
II.—PARLIAMENTARY SOVEREIGNTY	12

PART II.—THE SUBJECT.

III.—LEGAL STATUS OF THE SUBJECT	31
IV.—LIBERTY OF THE SUBJECT	47
V.—LIBERTY OF DISCUSSION	61
VI.—RIGHTS OF ASSOCIATION AND PUBLIC MEETING	68
VII.—ROUTES AND RIOTS AND MARTIAL LAW	76
VIII.—TREASON, SEDITION AND OFFENCES	88
IX.—ALLEGIANCE—NATURALISATION—EXTRADITION—FOREIGN JURISDICTION OF CROWN—FUGITIVE OFFENDERS	96

PART III.—THE CROWN.

X.—TITLE TO THE CROWN	107
XI.—THE ROYAL FAMILY	111
XII.—THE ROYAL PREROGATIVE	114
XIII.—PROCEEDINGS BY AND AGAINST THE CROWN AND ITS SERVANTS	145
XIV.—THE CROWN AND THE CHURCH	154
XV.—ARMY AND NAVY	164
XVI.—THE COUNCILS OF THE CROWN	172
XVII.—THE PRESENT PRIVY COUNCIL—COUNCIL OF DEFENCE	179
XVIII.—SECRETARIES OF STATE AND THEIR UNDER-SECRETARIES	183
XIX.—THE PERMANENT CIVIL SERVICE	185
XX.—IMPORTANT DEPARTMENTS OF STATE	187
XXI.—COLONIES AND SELF-GOVERNING DOMINIONS	197

PART IV.—JUDICATURE.

CHAPTER	PAGE
XXII.—COURTS OF JUSTICE	225
XXIII.—THE CRIMINAL COURTS	240
XXIV.—THE CORONER	247
XXV.—THE SHERIFF	249

PART V.—PARLIAMENT.

XXVI.—THE HIGH COURT OF PARLIAMENT	251
XXVII.—PARLIAMENT AND THE CROWN	259
XXVIII.—CONVENTION OF A NEW PARLIAMENT—OPENING OF A NEW SESSION	262
XXIX.—OFFICERS OF PARLIAMENT	266
XXX.—THE HOUSE OF LORDS	269
XXXI.—PRIVILEGES OF THE LORDS	282
XXXII.—THE LORDS AND COMMONS IN CONFLICT	285
XXXIII.—PRIVILEGES OF COMMONS—CONFLICT BETWEEN COM- MONS AND LAW COURTS	290
XXXIV.—HISTORY OF LEGISLATION—PUBLIC BILL LEGISLATION —PRIVATE BILL LEGISLATION	304
XXXV.—TAXATION AND FINANCE	314
XXXVI.—PROCEDURE IN THE COMMONS	322
XXXVII.—ORIGIN OF MEMBERSHIP OF THE COMMONS AND PERSONS INELIGIBLE FOR MEMBERSHIP	329
XXXVIII.—THE PARLIAMENTARY FRANCHISE	334
APPENDIX A.—(I.) CONSTITUTIONS OF NORTHERN IRELAND AND THE IRISH FREE STATE	345
(II.) NOTE ON THE SYSTEM OF GOVERNMENT IN INDIA	354
(III.) UNITED STATES CONSTITUTION	361
B.—THE TREATY-MAKING POWER OF THE CROWN	365
C.—CESSION OF TERRITORY	367
D.—EMERGENCY POWERS ACT, 1920	368
E.—CHARTERS AND OTHER CONSTITUTIONAL DOCU- MENTS	370
F.—THE CRIMINAL AND CIVIL JURY	380

LIST OF WORKS.

The following is a list of the works referred to *inter alia* in this book:—

- ANSON, Law and Custom of the Constitution.
AUSTIN, Lectures on Jurisprudence.
BLACKSTONE'S Commentaries.
BROOM'S Constitutional Law.
— Legal Maxims.
BRYCE, Studies in History and Jurisprudence.
CARTER, History of English Legal Institutions.
CHITTY, Prerogative of the Crown.
CRAIES, Treatise on Statute Law.
CRIPPS, Church and Clergy.
CRUISE on Dignities.
DICEY, Law of the Constitution.
Encyclopædia of the Laws of England.
FEILDEN, Constitutional History of England.
HALL, International Law.
—, Foreign Powers and Jurisdiction of the British Crown.
HALSBURY, Laws of England.
HALLAM, Constitutional History.
HAWKINS, Pleas of the Crown.
HOLLAND, Elements of Jurisprudence.
ILBERT, Parliament.
—, Manual of Procedure.
LANGMEAD (TASWELL-), English Constitutional History.
LOWELL, Government of England.
MAITLAND, Constitutional History of England.
MAY, Constitutional History.
—, Parliamentary Practice.
PALMER, Peerage Law in England.
PHILLIMORE*, Ecclesiastical Law.
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ROUND, Peerage and Pedigree.

SAFFORD AND WHEELER, Practice of the Privy Council.

STEPHEN'S Commentaries on the Law of England.

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STUBBS, Constitutional History.

THOMAS, Leading Cases in Constitutional Law (5th ed.).

TODD, Parliamentary Government.

TRAIL, Central Government.

TABLE OF CASES.

	PAGE		PAGE
A.		Bonanza Creek Goldmining Co.	
Abergavenny Case	272	<i>v. R.</i>	5
Adam <i>v. Ward</i>	63	Bonham, Case of Dr.	21
Albany Peerage	274	Bowles <i>v. Att.-Gen.</i>	22
Alcock, Case of Mr.	298	Bradlaugh <i>v. Gossett</i>	300
Allen <i>v. Flood</i>	68, 69	Bristol Case	273
Almon's Case	26	Brocklebank <i>v. The King</i>	23
Anderson <i>v. Gorrie</i>	34	Buckhurst Peerage	276
Arundel Case	272	Burdett <i>v. Abbott</i>	119, 301, 302
Ashby <i>v. White</i>	299	Burgess's Case	336
Att.-Gen. <i>v. Bradlaugh</i>	264	Buron <i>v. Denman</i>	33
— <i>v. Brown</i>	17n	Bushell's Case	381
— <i>v. Cain</i>	203		
— (Australia) <i>v. Colonial</i>		C.	
Sugar Refining Co.	5	Calder <i>v. Halkett</i>	34
— <i>v. De Keyser's Royal</i>		Calvin	96
Hotel, Lim.	133	Cameron <i>v. Kyte</i>	205
— <i>v. Kohler</i>	120	Campbell <i>v. Hall</i>	201
— (Straits Settlement) <i>v.</i>		Canadian Prisoner's Case	56
Wemys	147	Canterbury (Viscount) <i>v. Att.-</i>	
— <i>v. Wilts United Dairies...</i>	23	Gen.	119
Aylesbury Men, Case of the ...	299	Carbonit Aktiengesellschaft, In	
		<i>re</i>	151n.
B.		Carleback's Case	102n.
Bacon, Impeachment of	256	Castioni, <i>Re</i>	103
Badman Brothers <i>v. R.</i>	151	Caton <i>v. Caton</i>	22
Bainbridge <i>v. Postmaster-</i>		Central Control Board <i>v. Cannon</i>	
General	121	Brewery	136
Barnardiston <i>v. Soame</i>	300	Chamberlain's Settlement	100
Barton <i>v. Taylor</i>	208	Charlton, Case of Mr.	298
Bate's Case	133, 315 and n.	City of Montreal <i>v. Ecclesias-</i>	
Beattie <i>v. Gillbanks</i>	71	tiques du Seminaire de St.	
Berkeley Peerage	273	Sulpice	210
Bishop of Exeter <i>v. Marshall...</i>	154	Clifton Case	271
Blair (Adam), Impeachment of..	256	Commendam's Case	16n.
Bodg., Baron de B., Case	148	Convocation, Case of	155
Bolivia Exploration Syndicate,		Conway, Case of General	292
<i>Re</i>	131	Cumming <i>v. Forrester</i>	119
		Cushing <i>v. Dupuy</i>	210

Table of Cases.

	PAGE		PAGE
D.			
Daily Telegraph v. MacLaughlin	210	Fraser v. Hamilton	83
Damaree and Purcha	89	Fray v. Blackburn	35n.
Danby, Case of Lord	257 and n.	Freschville Peerage Case	271
Davison v. Duncan	63	Freyberger, Ex parte	98n.
Davitt, Case of Michael	300	Fryer v. Bernard	209
Dawkins v. Paulett	37		
— v. Rokeby	37	G.	
Day v. Savage	21	Gidley v. Palmerstone	149
De Bode, Case of Baron	148	Girl Grace, Case of the	54n.
De Keyser Case	133	Godden v. Hales	19
De Lisle Peerage Case	272	Goodwin's Case	298, 342
Deeming, Ex parte	210, 211	Gossett v. Howard	301
Devon Peerage Case	276	Goudy v. Duncombe	296n.
Dill v. Murphy	208	Gould v. Stuart	150
Doyle v. Falconer	208	Gout v. Cimitian	102n.
Driefontein, &c. Mines v. Janson	45	Graham v. Commissioners of Public Works	36, 150
Duke of Chateau Thierry, Ex parte	43	Grant v. Secretary of State for India	150
Dunn v. Macdonald	36, 150	Gschwind v. Huntington	98n.
— v. The Queen	150		
E.		H.	
Elliot, Hollis and Valentine	292	Hales v. The King	150
Elphinstone v. Redrecchund	86	Hampden (Ship-money Case)	132, 315
Entick v. Carrington	26	Harwich Case	333
Ertel Bieber, &c. v. Rio Tinto	45	Hastings, Impeachment of	256
Eton College Case	20	— Peerage	271
F.		Haxey's Case	291
Farnell v. Bowman	147	Hay Peerage Case	277
Fasbender v. Att.-Gen.	100n.	— v. Tower Division Justices	126
Feather v. The Queen	146	Hearson v. Churchill	165
Ferrers, Case of	297	Heddon v. Evans	82
Field v. Receiver of Metropolitan Police	76	Henley v. Mayor of Lyme	35
Fitch v. Weber	98	Heywood v. Bishop of Man- chester	157
FitzHarris, Case of	256	Hill v. Bigge	205
FitzWalter Peerage Case	273, 277	Hornsey Urban District Council v. Hennell	121
Floyd, Case of	285	Houlden v. Smith	34
Forbes v. Cochrane	55n.		
Ford v. Blurton	382	I.	
— v. Sauber	382	Irwin v. Grey	152
Franconia Case	1		
Fraser v. Balfour	83		

Table of Cases.

xi

	PAGE		PAGE
J.		Mersey Docks Trustees v. Gibbs	148 and n.
Jarvis v. Surrey County Council	77	Metropolitan Water Board v. Johnson	237
Jenks's Case	51	Mitchell's Case	300
Justin v. Gosling	49	Mogul Case	68
		Mompesson, Impeachment of	256
K.		Morgan v. Seaward	146
Keighley v. Bell	79	Moss Steamship Co. v. Board of Trade	152
Kemp v. Neville	34	Mostyn v. Fabrigas	205
Kendillon v. Maltby	35	Munster v. Lamb	62
Kenealy, Case of	265	Musgrave v. Puledi	205
Kielley v. Carson	208	Musgrove v. Chund	129
Kimber v. The Press Association	62		
Kinloch v. Secretary of State for India	149	N.	
Koenig v. Ritchie	63	Nathan, Re	152
		Nelson and Brand, R. v.	68n.
L.		Norfolk Peerage Case	274
Lane v. Cotton	35	Novello v. Toogood	131
Leach v. Money	26		
Lee v. Bude, &c. Manufacturing Co.	22	O.	
Leyman v. Latimer	126	O'Brien, Ex parte Art.	57
London and Lancaster Assurance Co. v. Bolands, Lnn.	77	O'Donovan, Case of	300
Lord Mayor of London v. Cox	36	Onslow, Case of Mr.	298
Luby v. Wodehouse	33	Osborne v. Amalgamated Society of Railway Servants	24n., 70
M.		P.	
Macartney v. Garbutt	131	Parkinson v. Potter	131
Macbeath v. Haldimand	36, 149	Parlement Belge Case. See App. on Treaties.	
MacGregor v. Lord Advocate	148	Pater, Ex parte	62
Macleod v. Att.-Gen. of New South Wales	203	Peninsular and Oriental Co. v. Kingston	203
Macormick v. Grogan	119	Petition of Right Case	133
Madrazo v. Willes	147	Phillips v. Eyre	205
Mangena v. Lloyd	295	Pigg v. Caley	54
— v. Wright	295	Pitchers v. Surrey County Council	77
Marais v. General Officer Commanding	85	Pole, Impeachment of	255
Marks v. Frogley	83	Ponsford v. Financial Times	63
Markwald v. Att.-Gen.	98n.	Porter v. Freudenburg	45
Marshall v. The King	152	Poulton v. Morris	237
Melville, Impeachment of	256	Powell v. Apollo Candle Co.	202

	PAGE		PAGE
Pratt and others v. British Medical Association	69	R. v. Home Secretary; Ex parte O'Brien	57
Prince v. Gaynor	210	— v. Inspector of Leman Street; Ex parte Yenikoff	44
Prior of Malton's Case	296	— v. Kent Justices	121
Proclamations, Case of	16	— v. Knockaloe Camp Commandant; Ex parte Forman... ..	43
		— v. Lynch	89
Q.		— v. Nelson and Brand	85
Queen Caroline's Case	112	— v. Norris	126
Quin v. Leatham	69	— v. Picton	204
		— v. Pinney	79
R.		— v. Portobello Barracks C.O.; Ex parte Erskine Childers ...	83
Raleigh v. Goschen	147	— v. Richards	56
R. v. Ahlers	90	— v. Shawe	245
— v. Allen	56	— v. Speyer	40
— v. Archbishop of Canterbury	158	— v. Superintendent of Chiswick Police Station; Ex parte Sacksteder	90
— v. Arnaud	41	— v. Vaughan	90
— v. Atkinson	79	— v. Vincent	71
— v. Billingham	71	Rhondda, Case of Lady	46
— v. Bradlaugh and Bessant	66	Riel v. Regina	202
— v. Broadfoot	129	Robinson & Co. v. The King ...	136
— v. Brown	86n.	Rossa, Case of	300
— v. Burns	93	Royal Aquarium v. Parkinson ...	62
— v. Casement	90	Rustomjee v. The Queen	149
— v. Clarke	39	Ruthyn Peerage	225
— v. Commissioners of Inland Revenue	148	Ryves v. Duke of Wellington ...	151
— v. Commissioners of Treasury	148		
— v. Creevey	292	S.	
— v. Crewe; Ex parte Segkome	199	Sacksteder's Case	44
— v. Davison	62	St. John Peerage Case	272
— v. De Berenger	70	Salaman v. Secretary for India ..	33
— v. Elliot and Others	292	Saltpetre Case	132
— v. Eyre	205	Scott v. Stansfield	35n.
— v. Francis; Ex parte Markwald	98	Secretary for India v. Shri-Rajah Rao	1
— v. Governor of Brixton Prison; Ex parte Sarno	43	Segkome	199
— v. Halliday; Ex parte Zadig	56	Seven Bishops' Case	18
— v. Hampden (ship-money). ..	315	Shaftesbury, Case of	251, 284.
— v. Hickling	66	Sheriff of Middlesex, Case of ...	301
		Shipton, &c.; Co. v. Harrison Brothers	133
		Shirley v. Fagg	285
		Shirley's Case	297
		Simon Appu's Case	147

Skinner v. Coast Ind. Co.	285
Slade's Case	227n.
Slave Grace, Case of the	54
Smalley's Case ..	297
Smyth Pigott's Case	160
Solomon's Case	101
Somerset's Case	54
Speaker of Victoria v. Glass ...	181,
	208
Speyer's Case	40
Stockdale v. Hansard	22, 302
Stock v. The Public Trustee ..	102n.
Strode's Case	292
Stuart v. Bell	63
Suarez, In re	131
Sullivan v. Spencer	204
Sutton v. Johnstone	36

T.

Taltarum's Case	229
Tandy v. Westmoreland	204
Taylor v. Best	131
Thomas v. Churton	35n.
— v. Sorrell	19
Thornton's Case	381n.
Thorpe, Case of	296
Tlonko v. Att.-Gen. (Natal) ...	203

Tobin v. The Queen	146
Trotman v. Dunn	62

U.

Usell v. Hales	63
----------------------	----

W.

Walker v. Baird	147
Warden v. Bailey	37
Ware v. Motor Association	69
Wason v. Walter	294
Weber, Ex parte	102
Wensleydale Peerage Case	277
Whalley, Case of Mr.	298
Wilkes v. Wood	26
Willoughby Peerage Case	279n.
Wiltes Peerage Case	276
Wise v. Dunning	71
Wolfe Tone's Case	87
Wright v. Fitzgerald	86

Y.

Yenikoff, Case of	44
Young v. Weller	185

TABLE OF STATUTES.

	PAGE
9 Hen. III. c. 29 (<i>Magna Charta</i>)	370
13 Edw. I. (<i>De Donis Conditionalibus</i> —Statute of Westminster II.)	229
18 Edw. I. st. 1 (<i>Quia Emptores</i>)	137n.
25 Edw. I. st. 1 (<i>Confirmatio Chartarum</i> —A.D. 1297)	314, 372
c. 29 (<i>De Tallagio non concedendo</i> —doubtful validity)	315
<i>De Prærogativa Regis</i> (17th year of Edw. II. supposed date—doubtful validity)	140n.
1 Edw. III. st. 2, c. 16 (Appointment of <i>Custodes pacis</i> —A.D. 1327)	240
25 Edw. III. st. 5, c. 2 (Statute of Treasons)	88
31 Edw. III. st. 1, c. 12 (Exchequer Chamber)	233
34 Edw. III. c. 1 (Appointment of Justices of Peace)	240
c. 14 (Traverse of Office)	146
36 Edw. III. c. 14 (<i>Monstrans de Droit</i>)	145
46 Edw. III. (No lawyer to sit in Parliament—the Unlearned Parliament—A.D. 1372)	330
8 Rich. II. c. 5 (Court of Constable and Marshal)	81
13 Rich. II. st. 1, c. 1 (Pardon)	126
st. 1, c. 2 (Court of Constable and Marshal)	81
c. 3 (Admiral's jurisdiction)	230
15 Rich. II. st. 1, c. 5 (Admiral's jurisdiction)	230
7 Hen. IV. c. 15 (As to returns to writs)	342
1 Hen. V. c. 1 (Members to reside in constituencies)	330
8 Hen. VI. c. 1 (Protection of clergy on way to Convocation)	160
c. 7 (County Members to be gentlemen born—creation of 40s. freehold franchise)	334
20 Hen. VI. c. 9 (Trial of wives of peers)	282
4 Edw. IV. c. 4 (Playing cards—see "Monopolies")	20
3 Hen. VII. c. 1 (Star Chamber Act)	25n.
4 Hen. VIII. c. 8 (Strode's Act)	292
5 Hen. VIII. c. 8 (Pardon)	126
25 Hen. VIII. c. 19 (Submission of the clergy)	154
27 Hen. VIII. c. 10 (Uses)	318n.
31 Hen. VIII. c. 8 (Statute of Proclamations)	15
c. 10 (Precedence of Princes and Princesses)	112
32 Hen. VIII. c. 1 (Statute of Wills)	318
c. 16 (Aliens)	39
33 Hen. VIII. c. 21 (Royal Assent)	261
1 Edw. VI. c. 1, s. 1 (Depraving the Lord's Supper)	66
c. 12 (Repeal of Statute of Proclamations)	15
1 Mary I. c. 1 (Crown: Status of Queen Regnant)	111
1 Eliz. c. 1 (Act of Supremacy)	154
c. 2 (Act of Uniformity)	155

	PAGE
5 Eliz. c. 1, s. 16 (Parliamentary oaths)	264
27 Eliz. c. 8 (Exchequer Chamber)	233
1 Jac. I. c. 13 (Freedom from arrest)	297
7 Jac. I. c. 2 (Aliens)	40
c. 6 (Parliamentary oaths)	64
21 Jac. I. c. 3 (Monopolies)	20
3 Car. I. c. 1 (The Petition of Right)	315, 372
16 Car. I. c. 10 (Abolition of Star Chamber)	25
c. 28, s. 16 (Militia ballot)	171n.
12 Car. II. c. 24 (Statute of Tenures)	318n.
13 Car. II. st. 1, c. 5 (Tumultuous petitioning)	74
14 Car. II. c. 4 (Act of Uniformity)	155
25 Car. II. c. 2 (Tests Act)	19
29 Car. II. c. 3 (Statute of Frauds)	318n.
30 Car. II. st. 2, c. 1 (Parliamentary oaths—Members to take Oath of Abjuration)	264
31 Car. II. c. 2 (Habeas Corpus Act, 1679)	52
c. 10 (<i>Habeas corpus</i>)	54
1 Will. & Mary, st. 2, c. 2 (Bill of Rights)	374
c. 30 (Royal mines)	141
5 Will. & Mary, c. 6 (Royal mines)	141
6 Will. & Mary, c. 2 (Triennial Act)	329
7 & 8 Will. III. c. 3 (Treason, challenge of jurors)	92
c. 15 (Parliament and demise of Crown)	260
c. 25 (Infants not to sit in Parliament)	331
11 Will. III. c. 12 (Trial of governors of colonies for offences committed abroad)	245
12 & 13 Will. III. c. 2 (Act of Settlement)	34n., 375, 376
c. 3 (Privilege of freedom from arrest)	297
c. 12, s. 6 (Interest on National Debt)	318
1 Anne, s. 2, c. 21 (Treason—A.D. 1702)	91
2 & 3 Anne, c. 12 (Privilege of freedom from arrest)	297
6 Anne, c. 24 (Annates and Tenths)	139
c. 41 (Disqualification from membership of Commons of pen- sioners and office holders)	331
c. 41 (Disqualification from membership of Commons of Judges)	331
7 Anne, c. 5 (Naturalization of foreign Protestants)	40
c. 12 (Diplomatic Privileges Act)	130
c. 21 (Treason procedure)	92
9 Anne, c. 5 (Property qualification for membership of Commons)	330
1 Geo. I. st. 2, c. 5 (Riot Act, 1714)	78
c. 38 (Septennial Act, 1715)	13
c. 56 (Disqualification of pension holders, House of Commons, 1715)	331
4 Geo. II. c. 21 (Naturalization Act, 1731)	98
11 Geo. II. c. 24 (Freedom from arrest)	297
20 Geo. II. c. 42 (Meaning of word "England")	197
24 Geo. II. c. 44 (Protection of officers acting under warrants)	36n.
42 Geo. II. c. 85 (Trial of officials for crimes committed abroad)	245
1 Geo. III. c. 23 (Commissions and salaries of Judges—Demise of Crown)	123

	PAGE
9 Geo. III. c. 16 (Nullum Tempus Act, 1769)	120
10 Geo. III. c. 47 (Trial in England of Indian officials for crimes committed abroad)	245
c. 16 (Grenville's Act)	343
c. 50 (Freedom from arrest, privilege of)	297
12 Geo. III. c. 11 (Royal marriages)	113
13 Geo. III. c. 21 (British nationality)	98
26 Geo. III. c. 96 (Impeachment of Warren Hastings)	256
36 Geo. III. c. 7 (Treason)	91
37 Geo. III. c. 70 (Inciting to mutiny)	93
c. 123 (Revolutionary meetings)	75
39 Geo. III. c. 11 (Irish statute—martial law)	85
39 & 40 Geo. III. c. 14 (Adjournments of the two Houses)	260
c. 67 (Irish Act of Union)	378
41 Geo. III. c. 63 (Exclusion of clergy from Commons)	331
45 Geo. III. c. 125 (Impeachment of Lord Melville)	256
54 Geo. III. c. 146 (Treason—Punishment)	91
55 Geo. III. c. 134 (Royal mines)	141
56 Geo. III. c. 100 (<i>Habeas corpus</i>)	54
57 Geo. III. c. 6 (Treason)	91
c. 19 (Meetings in London)	74
c. 117 (Subject and writ of <i>Quominus</i>)	153
59 Geo. III. c. 46 (Trial by battle and appeals of felony abolished)	381
60 Geo. III. c. 1 (Unlawful drilling)	75
5 Geo. IV. c. 83, s. 4 (Vagrants)	38
9 Geo. IV. c. 32, s. 3 (Pardon)	127
10 Geo. IV. c. 7 (Roman Catholic Relief Act, 1829)	330
11 Geo. IV. & 1 Will. IV. c. 70 (Exchequer Chamber)	233
2 Will. IV. c. 39 (Uniformity of Process Act)	228
2 & 3 Will. IV. c. 45 (English Reform Act, 1832)	335
3 & 4 Will. IV. c. 27 (Real actions)	226n.
c. 41 (Judicial Committee of the Privy Council)...179, 180, 181	
c. 42 (Abolition of wager of law)	227n.
c. 74 (Fines and Recoveries Act)	229
4 & 5 Will. IV. c. 36 (Central Criminal Court Act)	244
7 Will. IV. & 1 Vict. c. 26 (Wills Act, 1837)	318n.
3 & 4 Vict. c. 9 (Parliamentary Papers Act)	303
c. 113 (Archdeacons and deacons not to sit in Commons).....	159
5 & 6 Vict. c. 94 (Defence Act, 1842)	134
6 & 7 Vict. c. 68 (Theatres)	65
7 & 8 Vict. c. 66 (Aliens)	40
9 & 10 Vict. c. 95 (County Courts)	238
11 & 12 Vict. c. 12 (Treason Felony Act)	92
14 & 15 Vict. c. 19, s. 11 (Arrest for misdemeanours at night)	50n.
19 & 20 Vict. c. 16 (Central Criminal Court Act)	243, 244
20 & 21 Vict. c. 77 (Court of Probate Act)	232
c. 83 (Indecency)	67
c. 85 (Matrimonial Causes Act, 1857)	232
21 & 22 Vict. c. 106 (Membership of Commons—Secretaries of State)	184
23 & 24 Vict. c. 34 (Petition of Right (Procedure) Act)	151
c. 126 (Common Law Procedure Act, 1860)	226n.

	PAGE
25 & 26 Vict. c. 5 (Trial of military persons)	244
c. 20 (<i>Habeas corpus</i>)	54
26 & 27 Vict. c. 65 (Volunteers)	121
27 & 28 Vict. c. 34 (Under-Secretaries of State)	184
28 & 29 Vict. c. 63 (Colonial Laws Validity Act)	184, 207
29 & 30 Vict. c. 109 (Naval discipline)	167
32 & 33 Vict. c. 42 (Irish Church disestablishment)	13
33 & 34 Vict. c. 14 (Naturalization Act, 1870)	98
c. 23 (Forfeiture Act, 1870)	91
c. 52 (Extradition)	103
c. 90 (Foreign Enlistment Act, 1870)	105
c. 91 (Clerical Disabilities Act)	160
34 & 35 Vict. c. 31 (Trade Union Act, 1871)	68
c. 112 (Prevention of crime)	38
35 & 36 Vict. c. 15 (Parks and gardens)	73
36 & 37 Vict. c. 66 (Supreme Court of Judicature)	232 <i>et seq.</i>
37 & 38 Vict. c. 85 (Public Worship Regulation Act)	160
38 & 39 Vict. c. 77 (Supreme Court of Judicature)	232 <i>et seq.</i>
c. 86, s. 3 (Conspiracy and Protection of Property Act) ...	37
39 & 40 Vict. c. 36 (Customs Consolidation Act)	17
c. 57 (Winter Assizes Act)	244
41 & 42 Vict. c. 73 (Territorial waters)	1
42 & 43 Vict. c. 1 (Spring Assizes Act)	244
c. 49 (Summary Jurisdiction Act)	59
44 & 45 Vict. c. 60 (Newspaper libels)	64
c. 69 (Fugitive offenders)	105
46 & 47 Vict. c. 51 (Corrupt practices)	333
49 & 50 Vict. c. 38 (Riot—Damages)	77
50 & 51 Vict. c. 54 (British Settlements Act)	199
51 & 52 Vict. c. 41 (Local government)	73
c. 43 (County Courts Act, 1888)	238
c. 64 (Law of libel amendment)	63
52 & 53 Vict. c. 12 (Assizes Relief Act)	246
c. 18 (Indecent advertisements)	67
c. 63 (Interpretation Act, 1889)	197
53 & 54 Vict. c. 27 (Colonial Courts of Admiralty)	231
c. 37 (Foreign jurisdiction)	104
54 & 55 Vict. c. 39 (Stamp Act, 1891)	143
55 & 56 Vict. c. 23 (Foreign marriages)	104n.
c. 34 (Clergy discipline)	160, 161
56 & 57 Vict. c. 61 (Public authorities protection)	32
c. 73 (Local government)	73
58 & 59 Vict. c. 44 (Judicial Committee)	180
63 & 64 Vict. c. 12 (Commonwealth of Australia)	215
1 Edw. VII. c. 5 (Demise of Crown Act, 1901)	34n.
5 Edw. VII. c. 13 (Aliens Act, 1905)	41
7 Edw. VII. c. 9 (Territorial and Reserve Forces Act, 1907)	170, 246
c. 23 (Criminal Appeal Act, 1907)	57 <i>et seq.</i>
8 Edw. VII. c. 3 (Director of Criminal Prosecutions—The Prosecution of Offences Act, 1908)	192
c. 66 (The Public Meeting Act, 1908)	75

	PAGE
9 Edw. VII. c. 9 (South Africa Act)	221
1 & 2 Geo. V. c. 13 (Parliament Act, 1911)	287, 288, 289
c. 28 (Official Secrets Act, 1911)	94
4 & 5 Geo. V. c. 12 (Aliens Restriction Act, 1914)	42
c. 17 (British Nationality and Status of Aliens Act, 1914)	97 <i>et seq.</i>
c. 58 (Criminal Justice Administration Act, 1914)	48
c. 59 (Bankruptcy officials excluded from Commons— Bankruptcy Act, 1914)	331
c. 87 (Trading with Enemy Act, 1914)	17
c. 90 (Government of Ireland Act, 1914)	App. A.
5 & 6 Geo. V. c. 61 (Government of India Act, 1915)	App. A.
6 & 7 Geo. V. c. 22 (Re-election of Ministers Act, 1916)	332
c. 37 (Government of India (Amendment) Act, 1916 ...	App. A.
c. 68 (New Ministries and Secretaries Act, 1916—Air Board)	193
7 & 8 Geo. V. c. 51 (Air Force (Constitution) Act, 1917)	183
9 & 10 Geo. V. c. 21 (Ministry of Health Act, 1919)	192
c. 71 (Sex Disqualification (Removal) Act, 1919)	45
c. 73 (County Courts Act, 1919)	230
c. 91 (Ministry of Agriculture and Fisheries Act, 1919)	193
c. 92 (Aliens Restriction (Amendment) Act)	42
c. 101 (Government of India Act, 1919)	App. A.
10 & 11 Geo. V. c. 31 (Restoration of Order (Ireland) Act)	App. A.
c. 67 (Government of Ireland Act)	App. A.
c. 75 (Official secrets)	94
12 & 13 Geo. V. c. 4 (Irish Free State (Agreement) Act, 1922)	347
13 Geo. V. c. 1 (Irish Free State Constitution Act, 1922)	App. A.
c. 2, Sched. I. (6) (1) (High Court of Appeal for Ireland abolished)	347n.
sess. 2, c. 1 (Irish Free State Constitution Act, 1922)	349
sess. 2, c. 2 (Irish Free State (Consequential Provisions) Act, 1922)	353

ERRATA.

On page 67, second para., in lieu of words Post Office Act, 1870, *substitute* words Post Office Act, 1908, c. 48.

On same page, third para., *read* Post Office Act, 1908, c. 48, *for* Post Office Protection Act, 1884, c. 76.

On page 91, last para., first line, *for* word Felony *read* Forfeiture.

On page 92, third para., headed " Procedure in Treason," *read* William III. *instead* of Edward VI.

On page 152, at end of para. headed " Civil Proceedings at the Suit of the Crown," *add* in a bracket words [Cf. " Annual Practice," 1912].

On page 235, seventh line from end of page should *read* as follows : " Could require him to seal a document called a Bill of Exceptions."

On page 246, third para., third line, *read* Edward III. *instead* of Edward II.

On page 319, in para. headed " The Sinking Funds," *for* words Sinking Fund Act, 1878, *read* Sinking Fund Act, 1875.

On page 331, second para. should *read* as follows : " 3. Bankruptcy Officials (Bankruptcy Act, 1914)."

Outlines OF CONSTITUTIONAL LAW.

PART I. Introductory.

CHAPTER I.

INTRODUCTORY DEFINITIONS.

The State.—A State is an independent political society, occupying a defined territory (a), the members of which are united together for mutual protection and assistance. Its function is to repel aggression from without, and to maintain law and order within its own dominions.

Government defined.—The Sovereign, according to Austin, is the person or persons having supreme authority in an independent political society, and in every State there must be a sovereign power which exercises and controls the functions of government, and conducts and regulates the intercourse with other political societies. “The aggregate of powers,” says Sir William Markby, “which is possessed by the rulers of a political society is called sovereignty. A single ruler, where there is one,

(a) The territory of a State includes its territorial waters. As to the British doctrine of territorial waters and the marine league limit, see the Territorial Waters Jurisdiction Act, 1878 (c. 73), passed in consequence of the conflicting opinions in the *Franconia Case* (1876), 2 Ex. D. 62 (a case of manslaughter on a foreign ship by a foreigner). It has recently been decided that an island which comes into existence within the marine league limit belongs to the British Crown (*Secretary of State for India v. Sri Raja Rao* (1916), 85 L. J. P. C. 222).

is called the Sovereign; the body of rulers, where there are several, is called the Sovereign Body, or the Government, or the Supreme Government. The rest of the members of a political society, in contradistinction to the rulers, are called the subjects." (Elements of Law.) .

The internal functions of government are commonly divided into three categories, namely—(1) legislative, (2) judicial, and (3) executive. The legislature makes, alters and repeals the laws. The judicature, or judicial bench, interprets and applies them; the executive carries them into effect. The sovereign power of a State may be vested in a single individual, as in an autocracy, or in a smaller or larger body of citizens, as in the case of an oligarchy or of a democracy. The allocation of sovereign powers may vary indefinitely, but whatever the form of government may be, its functions must, in a modern State, be delegated to a large number of persons. Sir William Anson divides those persons into the following classes: Legislators, maintainers of order, and protectors of State independence in dealings with other societies.

Constitution defined.—The form and structure of government adopted by a particular State is called its Constitution. By the Constitution of a country, says Paley, is meant so much of its laws as relates to the designation and form of its legislature; the rights and functions of the several parts of the legislative body; and the structure, office, and the jurisdiction of the courts of justice (*Moral Philosophy*, bk. VI. ch. 7). A more adequate definition is suggested incidentally by Chancellor Kent in his commentary on American laws. The power of making laws, he says, is the supreme power in the State, and the department in which it resides will have such a preponderance in the political system that the principle of separation between the Legislature and other branches of the Government ought to be sharply defined. The Constitution of the United States has observed this demarcation with great fidelity. It has not only made a general delegation of the legislative power to one branch of the Government, of the executive to another, and of the judicial to a third, but it has specially defined the general powers and duties of each of these branches.

This suggests what is perhaps the most serviceable definition of a Constitution, that of Dicey. According to him, the Constitution of any country is that which determines the distribution and exercise of sovereign power within that country.

• Professor Ahrens defines the Constitution of a country as “ that *tout ensemble* (entirety) of fundamental institutions and laws by which the action of government (administration) and all the citizens are regulated ” (cited Holland, Jurisprudence, p. 306).

Constitutions, rigid or flexible.—Constitutions may be classified in various ways—as federal or non-federal, autocratic or democratic. But from the legal point of view the division into rigid and flexible is the most important (cf. Bryce, *Studies in History and Jurisprudence*, ch. 3). A rigid Constitution is one which is founded on fundamental written laws, whilst in a flexible Constitution all laws can be altered by the same machinery. By a fundamental law is meant a law dealing with the framework of the Constitution, which can only be altered by a special machinery provided by the Constitution for that purpose. The United States furnishes the palmary example of a rigid Constitution. Its Constitution, as framed in 1787, can only be altered on the motion of two-thirds of each House of Congress, and the proposed alteration must be ratified by the legislatures of three-fourths of the States composing the Union. In England, on the other hand, an alteration in the Constitution, such as an amendment in the rules relating to the succession to the Crown, can be effected by exactly the same machinery as an alteration in any ordinary law. But whenever a Constitution is reduced to writing, it must contain a certain element of rigidity even in the infrequent case where it can be altered by the ordinary law-making procedure. It can only be altered consciously and intentionally, whereas in so far as a Constitution depends on custom or convention, it may be altered gradually and imperceptibly by the adoption of new precedents, or by the obsolescence of old. The main characteristic of a Constitution founded on fundamental laws is this : the laws passed by the legislature may conflict with a fundamental law, and in that case it becomes the function of the courts of justice to declare their invalidity. If a law passed

by a State in America contravenes any provision of the Federal Constitution, the Supreme Court of the United States condemns it as *ultra vires*, just as the English Judicial Committee of the Privy Council declares invalid any colonial law which conflicts with the provisions of an imperial statute. In the allocation of sovereign powers under a rigid Constitution, the judicial bench, for certain purposes, is put in a position of superiority over the legislative department of government (cf. Lecky's *Democracy and Liberty*, ch. 1, p. 64).

The earliest important instance of a written Constitution in modern times is that of the United States. It was a written Constitution, and necessarily rigid. One great feature of the American Constitution, following the doctrine of Montesquieu, was the "*séparation des pouvoirs*," i.e., the laying down of a strict line of demarcation between legislature, judicature, and executive.

Though these functions are separate, they occasionally overlap, e.g., the President cannot declare war or make peace without the consent of two-thirds of the Senate, and the Senate also must be consulted as to high patronage.

A written Constitution based on the separation of powers places the head of the Executive in a difficult position. The American President goes down to Congress at its opening, and states the requirements of the Government, but his speech bears no resemblance whatever to the *oratio principis in senatu habita*, or even to the Speech from the Throne in the English Parliament. The President is not a member of the legislature, nor can he procure the passing of any law unless he can obtain the help of influential coadjutors in Congress.

Again, in rigid Constitutions the judges can disregard any statute which conflicts with the written Constitution. There is, accordingly, a danger of their causing mischief by overzeal for its observance, or, on the other hand, though it may seldom happen, by their misinterpreting the law owing to party bias or influence.

Flexible Constitutions are characterised by (1) adaptability to changed conditions, the legislature being able to destroy the whole fabric of the Constitution by a single enactment.

(2) The relationship between rulers and ruled, and the fundamental rights of citizens, are scantily defined, much being left to conventional rules of positive morality. (3) They are relics of antiquity.

Federal States.—All States are either unitary or federal.

A unitary State is one in which there is a sovereign legislature, and in fact there is only one State. It may also contain subordinate legislative bodies, but the Acts of the sovereign legislature will in every case override, in the event of a clash, those of the subordinate bodies. Thus a statute of the Imperial Parliament will in every case override any bye-law, or any Act of any Colonial legislature, with which it may happen to be in conflict.

A federal State is one whose Constitution apportions the sovereign power between a central or "federal" legislature on the one hand, and a system of local legislatures on the other, in such a way that each is sovereign within its prescribed sphere but neither may trench on the province allotted to the other. Such an apportionment may be achieved in two ways. Either as in the United States of America, the Constitution vests specified powers in the central body and leaves to the constituent units the whole undefined residue of powers, or (as in Canada) it may lodge specified powers in the units, and vest the residue in the central body. There are *dicta* of the Privy Council to the effect that in the latter case what results is not a federal State in the true sense of the word (*Att.-Gen. for Australia v. Colonial Sugar Refining Co.*, [1914] A. C. 237, and *Bonanza Creek Gold Mining Co., Lim. v. Rex*, [1916] A. C. at p. 579).

The purpose of a federal scheme is, according to Lord Bryce, to hold minor communities together (*Essays in History and Jurisprudence*, vol. 2, ch. 3); or, according to Dicey, to reconcile national unity and power with the maintenance of State rights (Dicey, ch. 3, p. 134, 5th ed.). It is an appropriate form of combination for States which desire "union as opposed to unity," affording as it does the means of mutual defence against other political societies while reserving to the component units as much independence as is compatible with the purpose for which they amalgamate. Where federalism exists the Constitution is inevit-

ably a written one, and the Courts can pronounce on the validity of any law which is at variance therewith.

Within the class of federal States some authors distinguish a species—"Confederated States"—in which the central authority exercises the minimum of authority over the units.

The recognition by the Treaty of Versailles of the self-governing Dominions as separate signatories of the Treaty and separate members of the League of Nations is a large step forward in their progress (in practice though not in law) towards the status of independent nations.

Requisites of a successful Federation.—The following are the requisites of a successful federation :—

1. A group of States banded together by a common nationality, physical contiguity, or long historical association.

2. A federal *esprit de corps*.

3. Such judicious distribution of sovereign powers between the Federal Government on the one hand and the States forming the union on the other as to obviate friction.

4. A carefully selected bench of judges, who should be well paid and be permanent officials not changing with the Government.

5. It being difficult to provide for every possible contingency in framing a Constitution, there should be a clear understanding as to legislation on topics not specifically allocated either to the supreme Government or the individual States (b).

Federalism, according to Professor Dicey, has the following characteristics :—

(A) The Constitution is supreme.

(B) The powers of government are split up amongst bodies with limited and co-ordinate authority.

(c) The duty of interpreting the Constitution falls upon the judicial bench.

(b) *Concomitants of a Federation.*—In every federal community one finds (1) federal laws and State laws, and where, as in the case of a British Dominion, the federal Government is not sovereign, there must be imperial laws also, which the citizens of the composite State have to obey; (2) there must be federal taxation and State taxation; (3) there must be federal officials and State officials, unless either class of officials act in a dual capacity (cf. Bryce, vol. 1, ch. 3).

These characteristics necessitate a written Constitution dividing the ordinary powers between the Federal Government and the State legislatures. Again, federal Constitutions must be rigid in the sense that special machinery must be employed to change fundamental or, rather, constitutional laws. Finally, each State must be a subordinate law-making body (Dicey, pt. I. ch. 3).

In the federal State, as compared with the State which is unitary, there is weak government, a tendency to conservatism and a predominance of the judicial bench (*ibid.*).

According to Lord Bryce (Essays, vol. 1, ch. 3), a federal Government ought to administer the army, the navy—and he would now add, the air force. It must also control posts and telegraphs, customs, which must be uniform, and have sufficient command of finance to make such control effective.

It is also most desirable that there should be a common coinage and common system of weights and measures. The federal Government should also be free to legislate for and deal with railway communications, industrial unrest—where the same is not confined to one state—immigration, and nationality.

Police, prison management, education, poor law, and other matters of a local character may advantageously be relegated to the States (*ibid.*).

Constitutional law.—Constitutional law, according to Austin, consists in the rules of positive morality, or the compound of positive morality and positive law, which fixes the constitution or structure of a given supreme government (Jurisprudence, Lecture VI.). Professor Dicey substantially adopts this definition, substituting the happy phrase “the conventions of the Constitution” for the Austinian “positive morality.” He concisely defines constitutional law as that body of rules which relates to the exercise and distribution of sovereign power in a State.

Professor Holland approaches the question from a somewhat different standpoint. He divides the realm of law into public and private, and attributes this classification to the Romans, who define public law as follows: *Ad statum Rei Romanæ*

spectat, in sacris, in sacerdotibus, et magistratibus consistit. Public law, according to that learned writer, that is to say, "the law between the State and the subject," may be divided into six heads, viz. :—1. Constitutional law; 2. Administrative law; 3. Criminal law; 4. Criminal procedure; 5. The law of the State in its quasi-private personality; 6. The procedure relating to the State, so considered. It is obvious that the line of demarcation between these different heads must be drawn more or less arbitrarily, according to the opinion and convenience of the writer who is dealing with them. We may take as an example offences against the State as such, *e.g.*, treason and sedition. They are a part of criminal law, but the punishments awarded for them are among the sanctions of constitutional law.

Administrative law.—Again, the line between constitutional law and administrative law is a hazy one. By administrative law is meant the body of rules which govern the exercise of executive functions by the officers to whom they are entrusted by the Constitution. But it is usually confined to the action of individual departments of the executive, including those local bodies to whom certain public functions are delegated. It does not extend to action on behalf of the sovereign body as a whole. For instance, treaties according to English law are made by the executive, but the rules regulating the treaty-making power belong to constitutional rather than to administrative law. On the other hand, the relations between the Ministry of Health and local administrative bodies, such as county councils or boards of guardians, are a branch of administrative law. Administrative law is, in effect, a subordinate branch of constitutional law, and any line of demarcation must be more or less arbitrary.

Field of constitutional law.—It follows from what has been already stated that constitutional law, in relation to the State, deals with the distribution and exercise of the functions of government, and is therefore concerned with the individual in his character as a citizen or subject. Constitutional law comprises that part of a country's laws which relates to the following topics,

amongst others :—The mode of electing the chief magistrate of the State, whether he be emperor, king, or president : his powers and prerogatives ; the constitution of the legislative body : its powers and the privileges of its members ; if there be two chambers, their relations *inter se* ; the status of ministers and the position of the civil service which acts under them ; the armed forces of the State and the liability of the citizens to be called on to serve in the army or navy ; the relations of Church and State, if these be formally recognised ; the relations between the central government and local bodies to whom subordinate functions of government are delegated ; the relations between the mother country and its colonies or dependencies ; the treaty-making powers, and the rules which regulate intercourse with other States ; the persons who constitute the body of citizens, the terms on which foreigners may be admitted to its territories and the privileges which they are permitted to enjoy ; the mode in which taxation may be raised and the revenues of the State may be expended ; the constitution of the courts of justice and the tenure and immunities of the judges ; the right to demand a jury where trial by jury exists ; the limits of personal liberty, free speech, and the right of public meeting or association ; the rights of the citizen to vote for elective bodies, central or local, and his liability to perform civic duties, such as serving on juries or aiding in maintaining order (cf. Dicey, 1st ed. p. 24, and Holland).

Conventions of the Constitution.—As it has already been stated, constitutional law consists partly of positive laws, cognizable and enforceable by courts of justice, and partly of customs and traditions, which Austin calls rules of positive morality and Professor Dicey calls conventions. These last are not enforceable in courts of law. So far as it consists of positive laws, it is to be found in Acts of Parliament and decisions of the law courts. The Acts of Union with Scotland and Ireland, and the Act which vacates a seat in the Commons when a member accepts an office of profit under the Crown, are instances of constitutional statutes. The decision in *Somerset's Case*, where it was held that slavery cannot exist in England, and that a slave

became a freeman as soon as he touched the English shore, established an important constitutional doctrine. . .

But the greater part of English constitutional law consists of conventions founded on custom, tradition, and precedent. The Ministry must resign if the Prime Minister (an officer unknown to the law) cannot command a majority in the House of Commons : but no court could enforce their resignation or restrain them from continuing to act. The conduct of a Ministry which refused to resign would be a breach of constitutional law, but it would more properly be described as unconstitutional than as illegal. The only sanctions behind the conventions consist in a sense of honour, respect for tradition, and the fear of popular resentment. Like all customary rules, the conventions of the Constitution vary in vitality. Some are of increasing vigour, some are obsolete, and some are obsolescent. No court would recognise as an Act a bill which had not received the royal assent, but it is difficult now to imagine circumstances under which the King would veto a bill which had passed both Houses. It is a constitutional rule that a peer shall not interfere in the election of a member of the House of Commons, but this is a rule which is now observed better in the letter than in the spirit. Mr. Dicey in an illuminating chapter, which should be read and re-read by every student, discusses the conventions of the Constitution, and formulates the more important of them. Among others, he refers to the rule of collective responsibility among the members of the Cabinet (a rule by no means always adhered to in the present day); the rule that a treaty should not be concluded or a war entered upon against the wishes of the legislature; the right of ministers to a statutory indemnity when, in a public emergency and for the public safety, they have acted outside the bounds of law. It may be noted that some of the conventions of the Constitution are framed like written laws; for example, the Standing Orders of the two Houses of Parliament. But their conventional character is shown by the fact that either House can at will suspend its Standing Orders.

Characteristics of the English Constitution classified.—The leading characteristics of the English Constitution are as follows :—1. Parliament is legally sovereign ; 2. The Constitution

is the outgrowth of the law of the land, and not its source, as is the case where the Constitution is written; 3. The conventions of the Constitution depend on the law of the land (Dicey); 4. The English Constitution is convenient rather than symmetrical (Anson); 5. The theory and practice of the Constitution are divergent (Anson); 6. Legislature and executive are joined by a connecting chain—the Cabinet.

CHAPTER II.

PARLIAMENTARY SOVEREIGNTY.

Parliamentary sovereignty.—The expression “parliamentary sovereignty” means that the King, the House of Lords, and the House of Commons can pass, amend, or repeal laws to any extent, and that there are no fundamental laws which Parliament cannot interfere with. The enacting formula of an Act of Parliament clearly shows the corporate character of the three branches of the Legislature and their interdependence. It runs as follows:—“Be it enacted by the King’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled and by the authority of the same, as follows.” Since the Parliament Act, 1911, however, the enacting words of a Money Bill are somewhat different.

Parliamentary sovereignty has a positive as well as a negative aspect. In its positive aspect it means that the King, the Lords, and the Commons acting together can make, alter or repeal any law; in its negative aspect it means that there is no legislative authority which can compete with Parliament (Dicey).

Though by the Parliament Act, 1911, the veto of the Lords over Money Bills has been abolished, and as to other Bills they have only a suspensive veto, it is still true for practical purposes to say that King, Lords and Commons are the legal sovereign. For although the King and Commons have control of finance to the exclusion of the Lords, yet the Parliament Act, which produced this result, derives its authority from the King, Commons and Lords, and could be repealed by them.

In England the nominal sovereignty is in the King, the legal sovereignty is in Parliament, and the political sovereignty is in the Electorate.

“When the ‘referendum’ comes there will be an end to the sovereignty of Parliament” (Pollard, p. 1).

Mr. Dicey abundantly illustrates the fact of parliamentary supremacy, and the student who desires to pursue the subject

is referred to the chapter on "The Sovereignty of Parliament" contained in his classical work. He gives as illustrations the disestablishment of the Irish Church (a direct contravention of the Act of Union); the Septennial Act, whereby Parliament extended its life from three to seven years; and he also tells us that the Scotch Act of Union has been overridden. As there are no fundamental laws, there is no judicial or other authority which can declare any given Act of Parliament invalid.

It has been suggested by certain writers that there are legal limits to parliamentary sovereignty.

(1) It is said that Parliament cannot legislate against the laws of morality. But clearly that is not so. Many people hold that the Divorce Laws contravene both the Divine and the moral law, but the courts must enforce and give effect to those laws, just as they give effect to any other law.

(2) It is said that Parliament cannot legislate against international law. But this is not so. There is a strong presumption that Parliament does not intend to infringe the rules of international law, and the courts sometimes put a forced construction on a statute in order to give effect to this presumption. If an Act of Parliament contravenes any principle of international law, the only remedy is by diplomatic action on the part of any State which may be injuriously affected.

(3) It is said that a statute cannot interfere with or derogate from the Royal Prerogative. The Act of Settlement is an answer to this contention. The alleged limitation is little more than a rule of construction. Parliament presumably legislates for the subject and not for the Sovereign, and the Crown can only be bound by express words or necessary implication. The usual formula for so doing runs: "The provisions of this Act shall bind the Crown." (Cf. Craies, *Statute Law*, ch. 7.)

In addition to the foregoing alleged limitations to parliamentary sovereignty, certain ancient limitations deserve notice. Among these were: (1) The King; (2) The judges; (3) Resolutions of either House of Parliament (a).

(a) The word "Parliament" in old days meant a "parley," or "talk," and the expression was first applied by monastic Statutes of the thirteenth century to the post-prandial discourses of monks, when they met in the refectory, which discourses, according to the Statutes, were unedifying. After this

(1) **THE KING.**—Till there was a Parliament the King was absolute, and Parliament, as we understand it, did not, according to the prevailing opinion, exist till 1295. Before 1295, it may be contended that Parliament was not a representative body. There was a great Council of Tenants *in capite*, but whether tenure *in capite* up to the reign of Edward I. was, or was not, a necessary qualification for membership is open to considerable doubt (see Ilbert, Parliament, p. 11). According, however, to the Magna Charta of 1215, the King's Council was at that time an assembly of tenants *in capite* (cf. Pollard).

The Model Parliament of 1295 was, if we except the so-called Parliament of Simon de Montfort, probably the first really representative assembly. It included, besides the Earls and Barons, the Archbishops and Bishops, who were summoned by the King's writ, and each prelate, whether bishop or archbishop, was enjoined to bring with him the deans and archdeacons, one proctor for the clergy of every cathedral, and two proctors for each episcopal diocese to represent the inferior clergy. The sheriff was, moreover, to summon two knights for each shire, two citizens for each cathedral city, and two burgesses for each borough (Ilbert, Parliament, p. 13).

The estates of the realm consist of the Clergy, the Baronage, and the Commons. Though Maitland says Edward I. wanted clergy who prayed, barons who fought, and commoners who worked, he appears to be of the opinion that the Parliament of 1295 was not a typical assembly of what is understood by the estates of the realm.

It is noteworthy that there were only forty-one barons at the Model Parliament, and Professor Pollard thinks that "the receipt of a writ at that time depended on the caprice or discretion of the Crown" (b).

the word was used in connection with conferences between sovereigns. After a further interval the word, in England, was applied to meetings of great men to discuss grievances either with or without the King, e.g., Simon de Montfort's Parliament, Henry III.'s Parliament. Lastly, Parliament denoted the body of persons assembled to confer. (See Ilbert, Parliament, p. 1.)

(b) Ninety-nine barons were summoned to the Parliament of 1300. To the Parliament of 1321 Edward II. summoned fifty-two barons. Pollard, p. 99.) Probably Edward I. summoned only those barons to whom he was partial.

Parliament, when summoned, soon asserted its power in various ways, *e.g.*, the establishment of impeachment in the reign of Edward III.; and in the reign of Henry VI., during the golden age of the later Plantagenets and Lancastrians, the Lords and Commons framed the Statutes, from which circumstance flowed rules of debate and procedure generally, and the King assented to Statutes in much the same fashion as at the present day.

But the King continued to legislate by ordinance. He was supposed thus to legislate on matters of trifling moment: matters of importance required, or were supposed to require, a Statute. What was trifling, however, and what was important occasioned many a serious conflict, as will hereafter appear (*cf.* Maitland, p. 18). A Statute was recorded on the Statute Roll, and could be revoked only by an Act of Parliament, whereas an ordinance could be revoked by the King in Council at any time (*ibid.*).

The King had two modes of legislating. When he wished the law to be promulgated to the public he made use of a proclamation, and in other cases he made use of an ordinance.

On the accession of Henry VII. there were supposed to be the following restrictions on the royal power:

No tax could be levied or law passed without consent of Parliament:

No man could be imprisoned without a legal warrant specifying his offence:

Ministers infringing the rights of the public could be sued, and could not plead, by way of defence, the royal authority:

Ministers could be impeached for high misdemeanours:

Civil and criminal cases were triable before a jury of twelve men as regards facts (Hallam, vol. 1).

Henry VIII. obtained from Parliament the right to legislate by proclamation, and the famous Statute of Proclamations was enacted which gave to such instruments the force of law. Though this Act was repealed in the first year of Edward VI., Edward VI.'s regents, Mary and Elizabeth, enforced proclamations, notwithstanding that it was agreed by the judges in the reign of Mary that no proclamation could make a new law

(Thomas, p. 8), but only confirm and ratify an ancient one (c).

In the reign of James I. the Commons complained of the abuse of proclamations (Langmead, p. 402), and Coke's (d) opinion and those of four of his colleagues were asked for, and were to the following effect :

- (A.) No new offence could be created by proclamation.
- (B.) The only prerogative possessed by the Crown is such as is conferred by the law of the land :
- (C.) To prevent offences the King can by proclamation warn his subjects against breaches of the existing law.

This decision was disliked by James I., who wanted to prohibit by proclamation the building of new houses in London (to check the overgrowth of the capital), and the manufacture of

(c) The proclamations of Mary and Elizabeth were respecting imports and also religious matters.

(d) Sir Edward Coke (1552—1631) was the most hard-working of English jurists, his contributions to the legal literature of the period being colossal. He was educated at Norwich Grammar School and Trinity College, Cambridge, and was called to the Bar at Lincoln's Inn in 1578. His skilful handling of the cases of Cromwell and Shelley brought him into prominence, and in 1586 he became Recorder of London. In 1592 he was appointed Solicitor-General, in 1594 Attorney-General, in 1606 Lord Chief Justice of the Common Pleas, and in 1613 Lord Chief Justice of the King's Bench. He is chiefly celebrated for obstinacy, pride, and for literary ability, but, to do him justice, he had principles, and acted on them. His celebrated dispute with Lord Ellesmere, when the latter attempted to restrain a man from enforcing a King's Bench judgment obtained by fraud, brought him into disfavour with James I. The King also sided against Coke in his dispute with Bancroft, the Primate, relative to prohibitions directed against the Courts Christian. The *Case of Commendams* lost Coke his position. He refused to allow Bishop Neale to hold livings in conjunction with his See, and this James I. considered to be an attack on his prerogative. The other Judges agreed with Coke, but, when summoned before James and the Council, relented. Coke remained obdurate, and was dismissed a few weeks afterwards (Langmead, p. 414). Maitland says that four "P's" ruined Coke, namely, pride, prohibitions, *praemunire*, and prerogative. Coke was the author of the celebrated *Institutes* bearing his name, in which were incorporated Littleton's *Treatise on Tenure*. He was also the author of eleven volumes of reports and the reputed author of two more such volumes. These reports disclose a remarkable knowledge of the Year Books, which were reports of legal cases containing arguments of counsel and judgments in almost unbroken succession from the reign of Edward I. to that of Henry VIII. Littleton was a judge in Edward IV.'s reign, and the chief cause of his name being handed down to posterity was the treatise above mentioned.

starch from wheat (so as to preserve wheat for human consumption). (Langmead, p. 404).

The decision of Coke had little effect, and time-serving judges continued to uphold proclamations, disobedience to which in the reign of Charles I. was punished in the Star Chamber.

The last instance occurred during Chatham's Ministry, when, owing to bad harvests, exportation of wheat was prohibited; but on this occasion the Ministers of the Crown were covered by an Act of Indemnity. George V., during the recent war, obtained a limited statutory power to legislate by proclamation. e.g., the Trading with the Enemy Act (e).

The Suspending and Dispensing Powers.—These were great impediments to parliamentary sovereignty. By virtue of the suspending power the King claimed indefinitely to nullify the operation of any given Statute; by virtue of the dispensing power he could do away with statutory penalties in favour of any particular individual or individuals.

The later power, if not the former, was derived from the Papal practice of issuing bulls *non obstante statuto*, "any law to the contrary notwithstanding."

Henry III. first made use of the *non obstante* clause, and, in fact, exercised both powers.

The Commons in the reign of Richard II. accorded to that King the like privilege as to the Statute of Provisors, a Statute restricting the Papal power of nominating foreign clerics to English livings and dignities, but stipulated that it should not become a precedent. Henry IV. had similar indulgences from Parliament. In the reign of Henry V. the Commons prayed for a statute to expel aliens from the country, and the King granted

(e) Section 43 of the Customs Act, 1876, provides that the importation of arms, ammunition, gunpowder, or any other goods may be prohibited by proclamation or Order in Council. In the case of *Att.-Gen. v. Brown*, [1920] 1 K. B. 773; Thomas, 4, it was held that the words "any other goods" denoted goods of the same class as those previously specified, and, therefore, that a proclamation purporting to prohibit the importation of an article which was not of that class, to wit, pyrogallic acid, used in photography, was *ultra vires* and invalid. In this case the Government contended that the importation of pyrogallic acid, a chemical, could be prohibited by proclamation, but it was held that the prohibition of importation of all chemicals was invalid.

their petition on condition that he might dispense with the statute at his discretion.

In the reign of Henry VII. it was decided that the King could at common law dispense with *mala prohibita* but not *mala in se* (Langmead, p. 253), and, subject to this restriction, both the suspending and dispensing powers were treated as parts of the prerogative during the sixteenth and seventeenth centuries. The Stuarts used these so-called prerogatives to subvert fundamental laws, and the unscrupulous use of the suspending power cost James II. his throne. The circumstances of the case were as follows : James II. issued a proclamation that a Declaration of Indulgence in matters of religion should be read in the churches and that the bishops should distribute copies of the declaration in their dioceses. The declaration purported to suspend the operation of all laws directed against Romanists. The Primate and six bishops signed a petition that his Majesty should not insist on the declaration being read, on the ground of its being illegal and against their consciences.

This petition was printed and circulated by sympathisers, and their conduct resulted in a criminal information for libel against the bishops. They were summoned before the King and his Council and, on admitting their signatures, were committed to the Tower for seditious libel. At the trial they were acquitted by the jury, the right of the subject to petition the King, which was afterwards contained in the Bill of Rights, being admitted.

Charles II. made use of the suspending power on two occasions : (1) When he successfully suspended the operation of the Navigation Act. (2) When he unsuccessfully issued a declaration similar to that of his successor, on which occasion he prudently gave way to Parliament.

The first important case on the dispensing power occurred in the reign of Henry VII., when it was held by the judges that although a Statute forbade any man to hold the office of sheriff for over a year and expressly barred the operation of a *non obstante* clause, nevertheless the grant of a shrievalty for life if it contained such a clause would be valid. This case was approved by FitzHerbert, a judge who flourished in the reign

of Henry VIII., the author of a celebrated treatise known as "De Naturâ Brevium," and the reputed editor of Bracton's Note-book, containing numerous reports of decisions in the reign of Henry III. (who was the real editor is doubtful).

In the case of *Thomas v. Sorrell* (1674), Thomas, p. 7, the plaintiff claimed a large amount as a penalty for selling wine without a licence contrary to a Statute of 12 Charles II. The jury returned a special verdict that they had found a patent of 9 James I. incorporating the Vintners Company and granting them permission to sell wine without a licence, *non obstante* an Act of 7 Edw. VI. forbidding the same.

The judges decided to the following effect. That the King might dispense with an individual breach of a penal statute by which no man was injured, or with the continuous breach of a penal statute enacted for the King's benefit (cf. Anson, vol. 1, p. 314).

In *Godden v. Hales* (1686), 11 St. Tr. 1165; Thomas, 8, a collusive action was brought to test the King's dispensing power. Sir Edward Hales, the defendant, was sued for that he, after being appointed colonel of a Foot Regiment, had neglected to take the oaths of supremacy and allegiance and to receive the Sacrament according to the Test Act of 25 Charles II. The defendant had been convicted under the above Act at Rochester Assizes, and the plaintiff sued him for a penalty recoverable thereunder.

The defendant pleaded a dispensation of James II. discharging him from taking the oaths and also the Sacrament. The Court held, by twelve judges, that the dispensation barred the right of action.

This decision nearly coincides with the view of Coke (see Co. Litt. 120 a and 3 Inst. 154 and 186).

Blackstone says that the doctrine of *non obstante*, which sets the prerogative above the law, was effectually demolished by the Bill of Rights, and "abdicated Westminster Hall when James II. abdicated the Kingdom" (Blackstone, I. 342).

This is true as to the suspending power, but there may be still perhaps left to the King not only the power to pardon but

also a limited amount of dispensing power. (Halsbury says there is none.)

The clauses as to the dispensing power in the Bill of Rights are as follows : (a) That the pretended power of dispensing with laws or the execution of laws by regal authority, *as it hath been assumed of late*, is illegal; (b) that no dispensation by *non obstante* be allowed, but that the same shall be held void . . . except a dispensation be allowed of in such statute.

The words "*as it hath been assumed and exercised of late*" deserve attention, as thereby the King's prerogative right to pardon was retained (Thomas, p. 25). These words were also utilised to procure a dispensation in the *Eton College Case*, where, owing to their insertion, a fellow of Eton College was allowed to hold a living in conjunction with his fellowship (Broom, Constitutional Law, p. 503).

There is a distinct contrast between pardon and dispensation, the former condoning past offences only, whilst the latter condones future ones as well (cf. Maitland, p. 308).

Monopolies.—Formerly the granting of monopolies by the King operated as a hardship on the public. In the *Case of Monopolies* (1602), 11 Rep. 85; Thomas, 1, Darcy, a servant of Elizabeth and grantee of the sole right of importing and making playing-cards, sued Allein for interfering with his grant. The Court held that the grant was a monopoly, and void, and that the Sovereign could not exercise her dispensing power to confer private gain on an individual contrary to the Act 4 Edw. IV., c. 4, which imposed a penalty on the importation of playing-cards and was enacted for the public good. This case was doubtless to some extent instrumental in bringing about the passing of the Statute of Monopolies, which provided to the effect that grants of monopolies were void with the exception of patents granted to inventors to have exclusive advantages of their patents for fourteen years. The time can now be extended by the High Court. As to the Crown using the patent, see *Feather v. The Queen* (post, p. 146). Notwithstanding the Statute of Monopolies, the grant of a sole right of trading to the East India Company was held valid because the grant was within the

prerogative (*East India Company v. Sandys* (1684), 10 St. Tr. 371, 515 *et seq.*).

2. THE JUDGES.—The judges of the seventeenth century, at all events, held that the Common Law (*f*) was of superior efficacy to an Act of Parliament, and even Blackstone in the eighteenth century does not treat a Statute with the respect it deserves. He says, *e.g.*, that Statutes contrary to Divine law should be disregarded. Coke, it is true, stated that “when an Act of Parliament is against common right and reason, or repugnant or impossible, the Common Law will control it.” Elsewhere he says of the power and jurisdiction of Parliament for the making of laws in proceeding by bill, “it is so transcendent and absolute as it cannot be confined either for causes or persons within any bounds. . . .” But in this passage he refers to Parliament as a “Court,” and adds concerning it, “*Si antiquitatem spectes est vetustissima, si dignitatem est honoratissima, si jurisdictionem est capacissima.*”

The chapter in which these words occur is headed “High Court of Parliament,” and this perhaps shows, in conjunction with the words “Court” and “*jurisdictionem*,” that Coke was not considering the word “Parliament” from a legislative standpoint. The first reference comes from *Dr. Bonham’s Case*.

Sir Thomas Smith, one of Elizabeth’s Secretaries of State, judging from his “Commonwealth of England,” emphatically endorses the view that Parliament is legally sovereign (Ilbert, *Parliament*, p. 26). Hobart, J., in the case of *Day v. Savage* (1615), Hob. 85, takes Coke’s view, as also does Bacon. Hobart said, “Even an Act of Parliament made against natural equity as to make a man a judge in his own cause is void, for *jura naturalia sunt immutabilia*, and they are *leges legum*.” Blackstone and his editor, Stephen, agree that Statutes are to be construed not according to the mere letter but the intent and object with which they were made. “It occasionally happens that the Judges who expound them

(f) Common law means general law as contrasted with special law. “It is unenacted law: thus it is distinguished from local customs. In the third place it is the law of the temporal Courts as opposed to the Courts Christian. In theory it is traditional law which always has been and still is law in so far as it has not been overridden by statute or ordinance” (Maitland, p. 22).

are obliged in favor of the intention to depart in some measure from the words " (Stephen's Commentaries, 3rd ed., p. 72). The proper rule is strictly to follow the Statute, and only to give weight to the intent with which it was passed when its language is ambiguous. In *Lee v. Bude &c. Mg. Co.* (1871), L. R. 6 C. P., at p. 576, Willes, J., a very high authority indeed, said, " Acts of Parliament are laws of the land and we do not sit as a Court of Appeal from Parliament."

Equity judges have at times shown a tendency to disregard a Statute; in fact, they look at a Statute from the standpoint of the evil it seeks to remedy, *e.g.*, the Statute of Frauds to prevent fraud prescribes (see section 4) writing as to contracts relating to sales of land and hereditaments. To prevent fraud Equity judges have held that such a contract may be enforced even though not in writing where there has been part performance (see Strahan and Kenrick on Equity, art. 99). In *Caton v. Caton* (1866), 1 Ch. 137, Cranworth, L.C., said: " When one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract, as, for instance, by taking possession of land or expending money in building or other like acts, it would be a fraud on the other party to set up the legal invalidity of the contract on the faith of which he induced or allowed the person contracting with him to act or expend money." Again, where, according to the Wills Act, a person would naturally be presumed to hold a legacy for his own benefit, yet he may be declared by a Court of Equity to be a mere trustee for a person not named in the will where the legatee was previously informed of the particular trust intended.

3. RESOLUTIONS OF EITHER HOUSE.—The two great cases as to the legal effect of a resolution of either House are *Stockdale v. Hansard*, 9 Ad. & El. 1, and *Bowles v. Att.-Gen.*, [1913] 1 Ch. 57. In *Bowles v. Att.-Gen.* Mr. Justice Parker held that a resolution of either House in the absence of statutory authority to that effect does not legalise the collection of a tax, or, in other words, the decision in *Stockdale v. Hansard* that a resolution of either House cannot alter the law of the land was upheld.

By the Provisional Collection of Taxes Act, 1913 (c. 8), temporary legal validity, to wit, four months, was given to the

Budget Resolutions so as to allow time for the Finance Act for the year, which is retrospective, to come into force.

In *Att.-Gen. v. Wilts United Dairies* (1921), 37 T. L. R. 884; Thomas, 27, the defendant company agreed with the Food Controller to pay 2d. per gallon of milk sold in consideration of the grant of a licence to sell milk. Several thousands of pounds became due under this contract, and the defendants declined to pay the money. The Court of Appeal held that the Food Controller by charging for his licence, even by agreement, had infringed the Bill of Rights, this being a levying of money to the use of the Crown without the sanction of Parliament. It was here contended that the Food Controller was acting under regulations authorised by the Defence of the Realm Act, but the Court was of opinion that he was acting outside his powers. In *Brocklebank v. The King* (1924), 40 T. L. R. 257, a similar arrangement for the payment to the Government of a bonus for licensing the sale of a ship was declared invalid.

Actual limitations to parliamentary sovereignty.—So far we have been considering the legal sovereignty of Parliament and the claims advanced from time to time by its rivals. While there are, as Mr. Dicey points out, no legal limitations on parliamentary sovereignty, it is subject to various actual limitations. He says that there is “an external limit which consists of fear of insurrection,” and also an internal limit, which consists in the fact that the dispositions of Sovereigns are moulded by the times and circumstances under which they live.

But there are further actual limitations to parliamentary sovereignty :—

(A.) *The growth of the power of the Crown.*—The power of the King has by the operation of the conventions decreased, but the power of the Executive (*i.e.*, the Cabinet) has increased. Under ordinary parliamentary conditions the Cabinet now practically monopolises legislation, and a private member of the House of Commons finds it increasingly difficult to introduce bills, and in general to take independent action. Whether a system of minority Government by one of three approximately

equal parties will tend to restore this independence is a question which the future will no doubt answer (g).

(B.) *The Electorate*.—The electorate are the political sovereigns of the country, and in the end can enforce their will.

(C.) *Leagues for political or industrial purposes*.—Under this head fall great trusts, combinations of labour, and purely political organisations such as the party “machines” or the Primrose League.

The British Government has been very favourable to combinations of workmen and to combinations of employers, and even international combinations of workmen have been tolerated to such an extent as to tie the hands of the Government and Parliament.

(D.) *The League of Nations*.—Professor Vinogradoff has stated in a lecture delivered at Oxford that the League of Nations is a super-Parliament. Though the League does not affect the legal sovereignty of Parliament, it must be admitted that some of its operations must sway the minds of members of either House and might impede their free judgment. Having regard, however, to the immense importance of the objects which the League of Nations is intended to serve, its maintenance is well worth the sacrifice of national pride, and even independence, involved. But there can be no doubt that where the League can exercise an influence in the internal management of the affairs of a State it must prove a fetter upon *de facto* parliamentary sovereignty. Article 8 of the Covenant provides that maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety, and it also suggests restrictions upon private manufacture of munitions. Again, our Dominions can, at the sittings of the Assembly appointed by the League, if they choose to do so, oppose our interests.

(g) In *Osborne v. Amalgamated Society of Railway Servants*, [1910] A. C. 87, at p. 115, Lord Shaw said: “Parliament is summoned by the Crown to advise His Majesty freely. By the nature of the case coercion, restraint, or a money payment which is the price of voting at the bidding of others destroys that function of freedom of advice which is fundamental in the Constitution of Parliament. . . . It is no doubt true that although a party to such contract of subjection” a member is independent of his constituents.

(E.) *A free Press, which can ventilate its opinion fearlessly.*—The Press was not always free. Ever since the invention of printing in the reign of Edward IV. it was considered a monopoly out of which the Crown could make a profit, and it was also dreaded as forming a possible instrument of heterodoxy. It was from the date of its birth subjected to censorship, and such censorship was continued throughout the Tudor period.

During the reign of Mary the mere possession of heretical or treasonable books was punishable under martial law. During the reign of Elizabeth no man could print either a book or paper without the licence of a bishop or the Council, and the ordinance further provided that the possession of Catholic writings involving controversy was to be punishable.

Printing was checked by the Star Chamber during the reigns of Elizabeth, James I. and Charles I. (Feilden, p. 244).

On May 23rd, 1623, the *Weekly News*, the first of English newspapers, appeared. The Long Parliament, though it abolished the Star Chamber (h), placed restrictions on printing.

In 1662 the first Press Licensing Act was passed and, although it remained in force only three years, was periodically renewed until 1679, when it was suspended for a time.

In 1680, in *Carr's Case*, Scroggs, C.J., said: "If you write on the subject of the Government, whether in terms of praise or censure it is not material, for no man has a right to say anything of the Government" (Langmead, p. 609). In 1685 the Press Licensing Acts were renewed for seven years, and again once

(h) This Court derived its name from the fact that the King's Council sat in a room known as the "Camera Stellata," or Star Chamber. Henry VII. created a Court inaccurately, perhaps, called the Star Chamber, but though its members were on rare occasions not members of the Council, still, in the main, they were so. On its civil side the Court took cognisance of disputes between alien merchants, and between alien merchants and Englishmen; questions of prize; unlawful detention of vessels; maritime questions not within the purview of the Admiral; suits between corporations; and appeals from the plantations, as the colonies were then called. On its criminal side, jurisdiction was exercised in cases of forgery, perjury, riot, maintenance, fraud, libel, conspiracy and all misdemeanours. The tribunal could inflict any punishment, death excepted. Defendants were examined on oath, and also had to answer interrogatories, i.e., questions in writing to be answered on oath (Langmead, 7th ed., p. 149).

more in 1692 for one year, and till the end of the following session of Parliament (*Id.*, p. 609).

After this the Press was supposed to be free, but it was fettered by the imposition of stamp duties and a straining of the law of libel (*ibid.*, p. 610). Nevertheless, newspapers multiplied. The first Stamp Act was passed in Anne's reign, and in George III.'s reign stamp duty was extended to other printed matter.

In 1763, owing to the attacks on the Government made by Wilkes in the *North Briton*, proceedings were taken against that paper. By straining the law, a general warrant (i) was resorted to, *i.e.*, a warrant issued by a Secretary of State for the arrest of the unnamed authors of No. 45 of the *North Briton*. Under this warrant Wilkes and others were arrested.

The Court held that a general warrant to search for and seize the papers of the unnamed author, printer or publisher of a seditious libel was illegal (*Wilkes v. Wood* (1763), Thomas, 117, 119).

In *Leach v. Money* (1765), 19 St. Tr. 1001; Thomas, 116, a general warrant to search for and seize the unnamed author of a seditious libel was declared illegal by Mansfield, C.J.

In *Entick v. Carrington* (1765), 19 St. Tr. 1036; Thomas, 118; Broom's Const. Law, p. 555, it was held that a warrant to search for and seize the papers of the named author of a seditious libel was illegal.

As to straining the law of libel, it was held in *Almon's Case*—(1) That the publisher of a libel was criminally responsible for his servant's acts unless proved to be not privy thereto, and that exculpatory evidence not being admissible, publication by the servant was evidence of the master's guilt. (2) That it was for the judge to determine the criminality of a libel, and for the jury to determine the fact of publication and whether the libel meant what it was alleged in the indictment to mean (Langmead, p. 612).

These trials encountered severe public criticism, and in the end Fox's Libel Act, 1792, enabled the jury to return a general verdict of guilty or not guilty in a libel case.

(i) General warrants were warrants issued by a Secretary of State to seize a person or his papers and were probably initiated by the Star Chamber. They were made use of until the above cases were decided.

The French Revolution brought about a temporary reaction, but after 1832 the Press was practically free. The publicity of all proceedings, including parliamentary debates, influences Parliament and perhaps somewhat fetters its action, and although Parliament can avoid this type of control by holding its debates in secret, yet secrecy is so repugnant to English ideas that secret debates (which have been held once or twice during the recent war) are a luxury which a modern Parliament cannot frequently afford.

Subordinate law-making bodies.—Legislative powers may be delegated as well as any other sovereign powers. *Prima facie*, the Crown legislates for colonies, but very wide legislative powers have been delegated in many instances to British colonies. The powers of the Australian and Canadian Legislatures are almost as wide as those of the Imperial Parliament; but what an Act of Parliament bestows it can in theory take away; and all British courts would be bound by an Imperial Act abrogating the powers of those Legislatures. Again, partly to save parliamentary time, and partly to provide for greater flexibility, a statute often delegates to a department of government or to a local authority a power of making rules or by-laws to carry out the provisions of the Act. So, too, the power of making rules of practice and procedure is usually bestowed on courts of justice. All statutory rules and orders of general application are collected and published annually by the Stationery Office.

A subordinate law-making body is a legislature, corporation, municipality, society or company (e.g., a railway company), which derives its authority to legislate either from the common law or the supreme legislature of the State to which it belongs (Craie, *Statute Law*). In the British Empire there are numerous law-making bodies, varying considerably as to their powers, the most noteworthy being the Crown, which has delegated its authority to Governors of colonies and others. The Crown, by prerogative, can make laws for conquered and ceded colonies, and also for protectorates and certain spheres of influence (cf. *Ex parte Sekgome*, [1910] 2 K. B. 576). The common law legislation of the Crown can be repealed by the Imperial Parliament, and where it is contrary to the fundamental principles of English

law it can be questioned by the Courts (*Campbell v. Hall* (1774), 20 St. Tr. 239; Thomas, 69). The powers of a Colonial Governor to legislate on behalf of the Crown depend on the authority delegated to him by the Crown or the British Legislature, and in the absence of proper delegation he can neither make new laws nor repeal existing ones (*Sprigg v. Sigcan*, [1897] App. Cas. 238, judgment pp. 247—248).

Colonial Legislatures.—These are non-sovereign law-making bodies, because they are controlled by the Imperial Parliament (which can repeal their laws) and also by the Crown (which has the power of veto). A Colonial statute is not void merely because it is repugnant to the common law. It is void (to the extent of repugnancy) where it is repugnant to an Imperial statute binding on the Colony, or to any document which it is to have the force of law under the provisions of the Colonial Laws Validity Act, 1865, s. 2.

Extra-territorial legislation (see *post*, p. 203) is, strictly speaking, *ultra vires*, but this rule is subject to exceptions (see *post*, p. 203). Colonial legislatures must obey their Constitution, and cannot legislate on topics which are not permitted thereby; and not only must the Constitution be obeyed, but also Imperial statutes binding on the colony and in certain cases statutes passed by a supreme federal legislature. A federal legislature, again, must obey its Constitution, and cannot encroach on State legislation where the Constitution forbids this to be done.

A Colonial judge, in determining whether any given section in a Colonial statute is valid, has not only to take into consideration statutes binding on the colony after it came into existence, but also regulations made under the authority of an Imperial Act which have the force of law, and he must pay particular attention to the provisions of the Colonial Laws Validity Act, 1865.

Statutory Rules.—These rules are examples of subordinate legislation: they chiefly relate to Court procedure and similar matters. Rules of Court are made by rule committees mostly comprised of judges, and like other subordinate legislative documents they can be questioned as *ultra vires*, and on the further ground that the formalities necessary to their validity have not

been duly complied with, e.g., that they have not been placed on the tables of both Houses for the prescribed period. In common with Orders in Council and proclamations, rules of Court sometimes govern instead of the Act creating their powers, and this occurs when from the wording of the statute an intention to that effect is clearly apparent.

Orders in Council.—These vary in validity. The King's common law legislative powers are restricted in the manner before referred to. Where a statute delegating legislative power has been repealed, the Order in Council or proclamation becomes *ultra vires* save as to past transactions (*k*) (cf. *R. v. Home Secretary, Ex parte O'Brien*, [1923] 2 K. B. 261). Proclamations are governed by the same rules as Orders in Council.

By-laws.—There is a cardinal distinction between a by-law and other subordinate legislation in that a by-law cannot infringe the law of the land. By-laws can be upset for the purpose of any given case, (1) When repugnant to English law, statutory or otherwise; (2) When they are expressed in uncertain language; (3) When they exceed the limits of legislative authority under which they are made; (4) When the preliminary formalities have not been complied with; (5) When they are unreasonable. By-laws of local authorities affect considerably the daily life of the man who has to obey them, as these bodies can tax him by the levying of rates and also subject him to fine and imprisonment and loss of his goods by distress.

Punishments for non-compliance are imposed by Courts of summary jurisdiction as a rule.

(*k*) This statute (the Restoration of Order in Ireland Act, 1920) is still valid as to Northern Ireland.

PART II.

The Subject.

CHAPTER III.

LEGAL STATUS OF THE SUBJECT.

General equality of all persons.—The subjects of the Crown cannot be punished or deprived of their possessions except by due course of law, and all subjects, whether they be officials or non-officials, are, as a rule, liable to trial in the ordinary courts by the ordinary magistrates and in the ordinary manner.

All men (the King excepted) are, in the main, equal in the eye of the law, and this means that if they break the law they are all equally liable to punishment in the ordinary courts of justice. The maxim of the law is that the King can do no wrong, but the reason is that he acts only through and in conformity with the advice of ministers, who are personally responsible for such advice and acts. But in all well-regulated States it is impossible to place all the citizens on an absolute equality in respect of all their actions—*e.g.*, A, in discharge of a public duty, may do a particular act with impunity which B cannot do when acting in a private capacity. To begin with, there must be certain classes privileged as to official acts; and, again, there must be classes whose rights are less extensive than those of the ordinary subject. Officials must differ from ordinary citizens to a limited extent, and in England they are, in a very limited sense, deemed a privileged class, and their immunities are less extensive than those of French officials.

In France, according to Mr. Dicey, a system known as “*Droit administratif*” prevails, and official courts have been

established where officials are tried before an official bench for acts done in an official capacity. As there is inevitably a fellow-feeling amongst officials, this system tends at times to pervert justice. Consequently the ordinary individual frequently endeavours to get his cause heard before the ordinary courts, and the "*Tribunal des Conflits*," which decides whether or not a particular case is to go to an official court or the ordinary court, has considerable work to do.

In the days of the Stuarts we had something like "*Droit administratif*," for in cases where the rights of the subject clashed with the royal prerogative the writ "*de non procedendo rege inconsulto*" was often utilised to the subject's prejudice (Dicey, ch. 12) (a).

Public Authorities Protection Act.—By the Public Authorities Protection Act (56 & 57 Vict. c. 61) no person can sue another in respect of any official act, or in respect of any neglect or default, whilst in the execution of any statutory duty, or of any public duty, except within six months after such act, neglect, or default, or in case of a continuance of injury or damage within six months after the ceasing thereof. Furthermore, opportunity

(a) It is worthy of remark that Professor Dicey, in the latest edition of his work, has modified to some extent his earlier criticisms of the French system of "*Droit administratif*." Doubtless he has been led to do so on account of what he calls the "*judicialising*" process to which this system has been subjected. In other words, it has lost its elasticity in a way analogous to that of our own system of equity, and consequently is not now characterised by that appearance of arbitrariness that seemed so much to favour the State at the expense of the individual. But even now it is undoubtedly true that at bottom the "*Droit administratif*" rests upon principles radically antithetical to those of our own *corpus juris*, which is permeated by the "*Rule of Law*" and Ministerial Responsibility.

It is hardly necessary to point out that the term "*Droit administratif*" finds no equivalent in English law, far less does it signify "*administrative law*" as described in a previous chapter of this book.

In a manner of speaking, we have faint adumbrations of such a notion even in our own system; for example, the subject cannot take legal proceedings against the Crown according to the ordinary forms of action, but must proceed by way of Petition of Right, and then only after obtaining the leave of the Attorney-General. Still, even here, there is lacking the primary characteristic of the French "*Droit administratif*," which, even if its principles have hardened into the technical certainty of a code, is the co-existence of State or official courts side by side with the ordinary courts.

must be given to the official of tendering amends, and when an action is commenced after tender of amends, or proceeded with after a payment into court, if the plaintiff does not recover more than the sum tendered or paid into court, he shall not recover costs incurred after such tender or payment into court. Where an action against an official is unsuccessful he can recover against the plaintiff costs on a higher scale than the ordinary individual can under similar circumstances.

Immunities of high officials.—There are other classes occupying important positions who must, for obvious reasons, have special privileges. A Viceroy, it seems, can commit certain wrongs on an individual with impunity, for which even ordinary officials could be penalised (*Luby v. Ld. Wodehouse*, Thomas, 91, cited and commented on in *Musgrave v. Pulido* (1879), 5 App. Cas. 111).

Acts of State.—The expression “act of State” is used in various senses. It is used in reference to important State documents or important executive acts. But in law it has a special meaning. Sir FitzJames Stephen defines an act of State as “an act injurious to the person or to the property of some person, who is not at the time of that act a subject of Her Majesty; which act is done by a representative of Her Majesty’s authority, civil or military, and is either sanctioned or subsequently ratified by Her Majesty” (Stephen’s History of Criminal Law, vol. 2, p. 61). It therefore denotes an act inflicting damage on a foreigner which would give him a remedy in our Courts, but is not cognisable by them because authorised or adopted by the Crown (cf. *Musgrave v. Pulido* (1879), 5 App. Cas. 111).

In *Buron v. Denman* (1859), 2 Exch. Rep. 167; Thomas, 182, the defendant, a naval captain, made a treaty with the chief of an uncivilised country for the abolition of the slave trade without the authority of the Crown, and then, in pursuance of the treaty, committed acts of aggression on the plaintiff’s property. The court held that the subsequent ratification by the Crown of an unauthorised treaty made what would otherwise have been illegal an act of State, and that consequently no right of action lay.

See, further, *Salaman v. Secretary of State for India*, [1906] 1 K. B. 613, C. A.; and Fraser on Torts, pp. 13—17.

Judicial immunities.—Where a judge acts either without jurisdiction or in excess of jurisdiction, a civil action lies at the suit of the person injured (*Houlden v. Smith* (1850), 14 Q. B. D. 850; Thomas, 149). But if the judge had no means of knowing that he lacked jurisdiction, *aliter* (*Calder v. Halkett*, 3 Moo. P. C. 28; Thomas, 150); and where, whilst acting within his jurisdiction, he makes a mistake, he is not civilly responsible (*Kemp v. Neville* (1861), 16 C. B. N. S. 523); and it has even been held that where a judge acts maliciously whilst within his jurisdiction, he is not civilly responsible (*Anderson v. Gorrie*, [1895] 1 Q. B. 670, C. A.; Thomas, 147). The editor of the fifth edition of Thomas's *Leading Cases in Constitutional Law* thinks that possibly a county court judge is protected by section 55 of the County Courts Act, 1888, as regards what is done under a warrant bearing the seal of the Court (Thomas, p. 49).

The reason for this immunity, as Lord Esher points out, is that otherwise judges would lose their independence, and that the absolute freedom and independence of the judges is essential to the due administration of justice (*Anderson v. Gorrie*, *supra*) (b).

The rule in England is that judges hold office during good behaviour and are not dependent on the will of the Executive. If a judge of the Supreme Court is guilty of gross misconduct he may be removed by the Crown on an address moved by both Houses of Parliament (c). Judges of inferior courts are, as a

(b) The late Mr. Justice FitzJames Stephen, in his *Digest on Criminal Law*, mentions a crime called "oppression," for which a punishment is prescribed against judges who act oppressively; but this offence is now, perhaps, obsolete.

(c) In spite of the Act of Settlement, under which the judges hold office "*quamdiu se bene gesserint*," it was determined on Anne's succession that the judges had to vacate their offices on the demise of the Crown (2 Ld. Raym. 768, and Annual Practice, notes to section 5 of the Judicature Act, 1875). By 6 Anne, c. 7, judges were to remain in office for six months after the death of the King, and now, by the Demise of the Crown Act, 1901, they are unaffected by the event. According to the Commons Journal, the judges of the great Courts of common law never sat in the Commons, but until 1840 (3 & 4 Vict. c. 66) the Admiralty judges could sit there. As to judicial posts created subsequent to 1840, the Act creating the office disqualified its holders from sitting in the Commons. The Judicature Acts disqualified the Master of the Rolls.

There is reason for believing that the judges originally sat and voted in the House of Lords, but either in the reign of Edward III. or his successor they were only summoned, as they now are, to treat and give counsel, a privilege

rule, removable by the Lord Chancellor for incompetence or misconduct : see, *e.g.*, County Courts Act, 1888, s. 15 ; Coroners Act, 1887, s. 8. In the case of other judges, as, for instance, recorders, the power of removal is somewhat obscure, but probably can be exercised by the Crown. Magistrates are removed by the Lord Chancellor by striking their names out of the commission of the peace.

Inferior courts are also controlled and kept within the bounds of their jurisdiction, even where no appeal lies, by the writs of mandamus, procedendo, certiorari, and prohibition, issued by the High Court as the successor of the old Court of King's Bench (*d*).

Official immunities.—Certain high officials are not civilly liable for the acts of their subordinates as ordinary persons would be : thus, in the case of *Lane v. Cotton* (1700), Salk. 17 ; Thomas, 74, the Postmaster-General was not deemed, as an ordinary employer of labour would have been, legally responsible for the acts of employés who had, under circumstances of carelessness, lost some valuable exchequer bills. Where, however, a public official is personally guilty of breach of a legal duty, he incurs civil liability in the event of an action, as a rule (*Henley v. Mayor of Lyme* (1828), 5 Bing. 17).

In general, an agent who exceeds his authority is personally liable, but when the agent happens to be a colonial governor the

shared by the Attorney- and Solicitor-General and the King's Serjeant. They formerly had to sit on the Woolsack in the Lords during session, but now they are only summoned by a special order (*ibid.*).

The conduct of the High Court judges must not, by a convention of the Constitution, be reflected on in Parliament by a question, or by way of amendment, or in debate, unless the discussion is based on a substantive motion in proper terms—see *Law Journal*, June 2, 1906.

(*d*) Words uttered by a judge in court during the hearing of a case cannot form the groundwork of an action for slander (see *Scott v. Stansfield* (1868), L. R. 3 Exch. 220 ; *Anderson v. Gorrie*, [1895] 1 Q. B. 668 ; Thomas, 147 ; *Fray v. Blackburn* (1863), 3 Best & Sm. 576). A contrary opinion, which is probably not now law, was held in *Kendillon v. Maltby* (1842), Car. & M. pp. 402, 409, where Lord Denman stated to the effect that all judges of superior and inferior Courts were liable in damages for slanderous words, either not relevant or uttered when a case was finished ; and in *Thomas v. Churton* (1862), 2 Best & Sm. 479 Cockburn, C.J., doubted whether slanderous words uttered on the Bench maliciously and without reasonable and probable cause were not actionable.

rule is different. Thus, in an old case where the Governor of Quebec contracted with a tradesman in his capacity of governor for the purchase of certain commodities, and the Treasury, deeming his conduct imprudent, disallowed a considerable portion of the price, he (the governor) was not held civilly responsible for the excess (*Macbeath v. Haldimand* (1786), 1 T. R. 172; Thomas, 72; see also *Dunn v. MacDonald*, [1897] 1 Q. B. 555). The last-named case also decides that a public servant purporting to contract on behalf of the Crown and wanting authority to make such contract is not liable to an action for breach of warranty of authority. Where, however, a civil servant expressly renders himself personally liable under a contract an action will lie against him if such contract is broken (*Graham v. Public Works Commissioners*, [1900] 2 K. B. 781) (c).

Where a civil servant is allowed to choose, and does choose, incompetent subordinates he is immune from liability (*Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 H. L. 124—*per* Lord Wensleydale).

A public official is not responsible where he enforces in a regular and reasonable manner any sentence or legal process, provided that he acts under an order or warrant purporting to be regular on the face of it, and that it is his duty to obey such order or warrant (*Lord Mayor of London v. Cox* (1867), 2 H. L. Cas. 269) (f).

Members of both Houses of Parliament possess certain immunities (see *post*), and so do clergymen.

Officials “inter se.”—Where government officials deal with subordinates a considerable amount of latitude is allowed in certain cases, and they can go scot free from liability in respect of actions which would subject others to severe legal penalties. In the case of *Sutton v. Johnstone* (1787), Bro. P. C. 76; Thomas, 127, the plaintiff was arrested at the instance of the defendant and detained in custody for a considerable time, and though he was

(e) The point is a somewhat doubtful one—see judgment of Phillimore, J., in above case.

(f) A public officer who acts under a warrant issued by a magistrate is exempted from civil liability by 24 Geo. II. c. 44, s. 6, on production of a copy of his warrant six days after demand being made for same. See *Fraser*, on Torts, p. 18.

ultimately acquitted by a court-martial, which exonerated him from all blame, it was held that no action lay against the defendant. Again, in the case of *Dawkins v. Lord Paulet* (1869), L. R. 5 Q. B. 94, it was held that no action lay in respect of what would otherwise have been libellous statements contained in a report made by a superior officer against his subordinate. See also *Dawkins v. Lord Rokeby* (1875), L. R. 7 H. L. 744; Thomas, 128; also cases collected in Fraser on Torts, p. 112.

In the case, however, of *Warden v. Bailey* (1811), 4 Taunt. 67, it was held that an action for damages lay where a man was imprisoned because he disobeyed an order made by a military superior, which that military superior had no jurisdiction to make (g).

Immunities of Trade Unions.—Two Acts have been passed exempting trade unions from criminal and civil liability to which ordinary persons are subject. As to criminal liability, “an agreement or combination by two or more persons to do or procure to be done any act in furtherance of a trade dispute shall not be indictable as a conspiracy if such act when committed by one person would not be criminally punishable” (Conspiracy and Protection of Property Act, 1875, s. 3). Nothing in the Conspiracy and Protection of Property Act is to affect the common law as to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the King or the State (section 3). The word “crime” for the purposes of the Act is to include summary offences.

By the Trades Disputes Act, 1906 (c. 47), any act done in pursuance of an agreement or combination by two or more shall, if done in contemplation of a trade dispute, not be actionable in a civil court unless the act complained of, if done without such agreement or combination, would be civilly actionable.

By section 3 of the Trades Disputes Act, 1906, any act done in contemplation or furtherance of a trade dispute is not to be

(g) Magistrates and others who act without jurisdiction, or in excess of jurisdiction, are liable to actions for damages. Accordingly, members of a court martial who pass a sentence they have no power to pass are all civilly liable (Manual of Military Law, ch. 8.)

actionable by reason only that it induces any person to break a contract of employment or interferes with any person's liberty to dispose of his labour or capital as he wills, and by section 4 actions of tort against trade unions, whether of workmen or masters, are prohibited.

Persons who labour under legal disadvantages.—We will now turn to those classes whose position in the social community brings them under special laws, or exposes them to certain disadvantages. Examples of these are :—

- (A.) Those belonging to certain callings, *e.g.*, the Army, the Navy, the Church. Soldiers and sailors are subject to military law, and clergymen are subject to the discipline of the ecclesiastical courts, and also to restrictions in trading.
- (B.) Those who, owing to previous convictions, must of necessity be placed under certain restrictions.
- (C.) Paupers, who are subject to certain electoral and other disabilities.
- (D.) Aliens. (An alien is any person who is not a British subject.)
- (E.) Bankrupts, who are ineligible for certain public offices and franchise.
- (F.) Outlaws.

The legal disadvantages of persons exercising particular callings need no comment here; but where persons have been previously convicted, they may be rendered liable to imprisonment in respect of conduct which would be readily explainable in the case of the ordinary citizen; *e.g.*, being found on someone else's premises without being able to give a satisfactory account of themselves. (Prevention of Crimes Act, 1871, s. 7.)

For the protection of society it is often necessary to punish conduct which is merely suspicious. By 5 Geo. IV. c. 83, s. 4, every person wandering abroad, and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, &c., not having any visible means of subsistence, and not giving a good account of himself, may be punished as a rogue and a vagabond.

The section further provides that every suspected person or

reputed thief frequenting any river, &c., or any place of public resort, &c., or any street or highway, &c., with intent to commit a felony, may be punished as a rogue and a vagabond. In proving the intent to commit a felony, it is not necessary to prove any act tending to show the purpose, but the prisoner may be convicted if, from the circumstances of the case and his known character, it appear that he contemplated a felony. There must be evidence that the prisoner was there more than once (*R. v. Clarke*, Metropolitan Police Guide).

Aliens.—By the common law aliens could not hold land or fill public offices or possess civic rights (Langmead, 7th ed., p. 539). Magna Charta (Art. 41) provided that all merchants should have liberty to enter, dwell, and travel in and to depart from England for purposes of commerce without being subject to any evil tolls but only to the ancient and allowed customs, except in time of war. On the breaking out of war merchants of the hostile States shall be attached, if in England, without damage to body or goods until it be known how our merchants are treated in such hostile State, and if ours be safe, the others shall be safe also. In the first re-issue of Henry III.'s charter the words "*nisi publice antea prohibiti fuerint*" were added after the opening words "*Omnes Mercatores*" (Langmead, 7th ed., p. 108) (*h*).

By 32 Henry VIII. c. 16, aliens could neither rent a shop nor a residence, but the statute was silent as to pre-existing restrictions. Higher taxation was imposed on aliens. At common law they could be expelled at the royal pleasure, this prerogative right being last exercised in 1575.

An alien could always be made a denizen by royal prerogative,

(*h*) Jews in Norman and Plantagenet times were counted as aliens with the exception that their position was not so secure.

The Norman Kings utilised the Jews to feed upon the people so that the King in his turn might feed upon them, which he did by tallages. In the reign of Henry II. the Jews must have been profitable to the King, for we hear of the "*Scaccarium Judaismi*," supervised at first by Jewish but afterwards by Christian judges. Magna Charta (article 10) provided that debts due to Jews were to bear no interest during the minority of the heir. In 1290 Edward I. banished the Jews, but Cromwell allowed them to visit England, and they were allowed to settle in England in the reign of Charles II. (Langmead).

or a British subject by a private Act. 7 James I. c. 2 provided that no alien should be naturalised until he took the Sacrament according to the rites of the Church of England, and the oaths of supremacy and allegiance in the presence of Parliament. These restrictions were avoided by private Acts. In 1708 an Act, 7 Anne c. 5, which only lasted three years, was passed which provided that all foreign Protestants could be naturalised (i).

During the wars with France in the eighteenth and nineteenth centuries aliens were placed for a time under severe restrictions, but these gradually disappeared after Waterloo.

In 1844 aliens obtained certain advantages under Hutts' Act, which enabled them (*inter alia*) to be naturalised under a certificate of the Home Secretary on taking the oath of allegiance, but they could not become members of Parliament or of the Privy Council, neither could they enjoy rights excepted by the certificate. (As to subsequent Acts affecting naturalisation and alienage, see *post*, Ch. IX).

In *Speyer's Case* (*R. v. Speyer*, [1916] 2 K. B. 858, C. A.) it was held that a naturalised alien could be a member of the Privy Council. Proceedings in the nature of a writ of *quo warranto* were instituted to determine the legality of Sir Edgar Speyer's appointment as a Privy Councillor, and the statutes relative to the claim were as follows : The Act of Settlement (section 3) provided that nobody born abroad or outside the British Dominions, though "*naturalised or*" a denizen, except born of English parents, should be eligible for (*inter alia*) the Privy Council. By section 7 of the Naturalisation Act, 1870, persons duly naturalised thereunder were to be entitled to all political and other rights of a British subject. By section 3 of the Naturalisation Act, 1914, holders of a certificate of naturalisation in the United Kingdom were to have all political and other rights appertaining to a natural-born British subject, and it was further provided that section 3 of the Act of Settlement, as regarded naturalised subjects, should be read as if the words "*naturalised or*" were omitted therefrom. The Court held that the Act of

(i) In 1753 an Act was passed permitting the naturalisation of Jews without taking the Sacrament.

1870 had repealed by implication section 3 of the Act of Settlement as regarded naturalised subjects, and that as the Act of 1914 had not revived the disqualification the appointment of Sir Edgar Speyer was valid.

“So long as the State to which he belongs is at peace with His Majesty, an alien in England enjoys full civil, as opposed to civic, rights. He owes temporary allegiance, and as he is subject to our laws, he enjoys their protection, *e.g.*, he can bring and defend actions and institute prosecutions. He can acquire land, has full personal liberty, and can generally do as he pleases; but though he must pay taxes when domiciled in England, he cannot exercise either the parliamentary or municipal franchise; neither can he own a British ship or any share therein. In *R. v. Arnand* (1846), 19 Q. B. D. 806, it was held that a company which had been registered in this country could own a British ship although all its members were aliens.

Undesirable aliens.—The immigration into this country of criminal and necessitous aliens gave rise, some years ago, to restrictive legislation. The Aliens Act of 1905 provides that an alien who is classed under the Act as “undesirable” may, under certain conditions, be prevented from landing, and the following are denominated undesirable aliens:—

1. Those who (not being political or religious refugees) cannot show that they have in their possession, or that they are in a position to obtain, the means of supporting themselves and their dependants.
2. Lunatic or idiot aliens, or those suffering from any disease or infirmity by which they may become a burden to the public.
3. Those who have been sentenced for an extraditable offence in a foreign country.
4. Those against whom an expulsion order has been made.

Under the regulations of the Secretary of State, the Act at present is only directed against the importation in bulk of undesirable aliens. Ships which bring more than twenty alien steerage passengers can only land them at certain named ports. Before landing the immigrants are inspected by the immigration officer, who rejects those who appear to be undesirables, subject

to appeal to an Immigration Board appointed by the Home Secretary.

The Act further provides for the expulsion of aliens who abuse our hospitality, and the following are liable to expulsion :—

- (A.) Aliens who have been convicted of felony, misdemeanour, or any other offence punishable with imprisonment without the option of fine, and disorderly prostitutes, provided that the convicting court recommends them for expulsion, and that the Home Secretary confirms the recommendation.
- (B.) Where it has been certified to a Secretary of State by a magistrate after proceedings taken for the purpose within twelve months after the alien has last entered the United Kingdom that such alien has—
 - a. Been in receipt of such parochial relief as would, if he were a natural-born subject, disqualify him for the parliamentary franchise.
 - β. That he has been living under insanitary conditions, or wandering without visible means of support.
 - γ. That an alien has entered the United Kingdom after the passing of the Act, having been sentenced in a foreign country in respect of an offence for which he could be extradited.

Provision is made by the Act for the detention in custody of undesirable aliens till the Secretary of State has made an order concerning them, and afterwards till their embarkation.

During the late war the following restrictions were imposed on aliens generally. By the Aliens Restriction Act, 1914, his Majesty was empowered in case of war or any national emergency to make orders—(a) prohibiting or restricting the landing of aliens in the United Kingdom, (b) for the departure of aliens from the United Kingdom, (c) for deportation of aliens, (d) to prescribe for aliens' residence within certain areas, (e) for registration of aliens, (f) for appointment of officials to supervise movements of aliens, (g) for imposition of penalties for non-compliance with orders, (h) for the arrest, detention, and searching of premises of aliens. Provision is also made for the summary punishment of persons offending against the Act. By the Aliens Restriction

Continuance Act, 1919 (c. 92), certain emergency powers were to be continuable as to aliens, and by section 3 of the Act any alien who either attempts to do or does any act calculated or likely to cause sedition or disaffection amongst any of his Majesty's Forces or the forces of his Allies or amongst the civilian population shall be liable to penal servitude up to ten years, or to imprisonment on summary conviction up to three months.

A penalty of up to three months' imprisonment is imposed where an alien promotes or attempts to promote industrial unrest in any industry in which he has not been *bona fide* engaged within two years prior to the summary proceedings being instituted against him.

The Act also prohibits an alien, subject to certain exceptions, from holding a pilotage certificate, or acting as master or chief officer of a merchant ship, or as skipper or second hand of a fishing boat.

Restrictions are also placed on aliens changing their names. Where, again, an alien sits on a jury, as he is liable to be called upon to do after ten years' residence in this country, any party to the proceedings may challenge him and so get him removed from the panel.

The Crown has, by its prerogative, right to detain an alien enemy during time of war.

During the war there were numerous decisions respecting aliens, their internment and deportation. In *R. v. Knockaloe Camp Commandant, Ex parte Forman* (1917), 34 T. L. R. 4, the Court held that the King by virtue of his prerogative could intern alien enemies, whether they be registered under the Aliens Restriction Act or not. In *Ex parte Sarno* (1916), 115 L. T. R. 608, Lord Reading, alluding to the powers under the Aliens Restriction Act, 1914, during war or emergency, stated that its object was to confer on the Secretary of State extraordinary powers of dealing with aliens, and it permitted sweeping regulations, but doubt was expressed as to whether the Executive or the alien had the right to choose the country to which the alien is to go. The use of the power of deportation as an act of comity to allies is exemplified in *Ex parte Duc de Chateau-Thierry*, [1917] 1 K. B. 922. In this case the French demanded the sur-

render of the Duke of Chateau-Thierry, who had resided in England for some years prior to the war. The Duke contended that he was a political refugee, and also that he was unfit for military service. Here the Court confirmed the order for deportation, and held also that the Government could choose a ship and place the Duke on board (*per contra*, cf. *Ex parte Sarno*, *supra*).

In *Sacksteder's Case* (1918), 118 L. T. 165, the applicant, who expressed his desire to enlist in the British Army, and failing to do so was ordered to be deported, the Court confirmed the order. The circumstances relating to the arrest of Sacksteder were peculiar. The Home Secretary had left general directions for the arrest of certain aliens under the Aliens Restriction Act, and the arrest of Sacksteder was carried out by the directions of the Home Secretary. He had previously given general directions that persons named in a deportation order were to be put on certain ships and detained in custody until they sailed. The Assistant Secretary instructed the police to arrest Sacksteder. On the hearing of a *habeas corpus* application the Court held (1) that Sacksteder was in legal custody; (2) that orders for deportation should be signed by the Home Secretary; (3) that the Court can go behind an order for arrest though it be valid on its face. In *Venikoff's Case*, [1920] 3 K. B. 72, it was held that an alien could be deported under the Act of 1914 without a preliminary enquiry into the circumstances of the case, an order of deportation being an executive and not a judicial act. The Aliens Restriction Act is a permanent Act conferring summary powers operating during time of war or other great emergency as to aliens; or, in other words, it contains clauses for coping with war and also sudden disorders.

Alien enemies.—An alien enemy is a person who voluntarily resides or carries on business in enemy territory. Thus an Englishman resident during the Great War in Germany was an enemy alien *quoad* this country. Local and not natural allegiance furnishes the test. But during the recent war an extended meaning was given to the term; at any rate, for trading purposes. Under the Trading with the Enemy Act, 1915 (c. 98), enemy

nationals and other persons having hostile associations may be treated as enemies though not residing in hostile territory.

As a general rule, except under licence from the Crown, an alien enemy cannot sue or initiate any proceeding in a British court. He may be sued, and therefore may appeal. If a cause of action has accrued to him before war, it is only suspended till peace comes, but no right of action can accrue to him during war.

When war is declared by this country the declaration operates as if it were an Act of Parliament prohibiting all intercourse with the enemy except under licence from the Crown. In the case of contracts made with an enemy before war, the contract is dissolved if the fulfilment of its conditions would involve any intercourse or dealings with the enemy during war.

For leading cases, see *Driefontein Consolidated Mines v. Janson* [1902] A. C. 384 (enemy status); *Porter v. Freudenberg* [1915] 1 K. B. 857 (legal proceedings); *Ertel Bieber & Co. v. Rio Tinto Co.* [1908] A. C. 260 (trading with enemy).

Under the Aliens Act of 1919 (*supra*) ex-enemy aliens are to be deported unless the Secretary of State, on the recommendation of a proper advisory committee, permits them to remain.

Until after the expiration of three years from the passing of that Act ex-enemy aliens are prohibited from acquiring land in the United Kingdom, having any interest in a key industry, or a share in a British ship.

Lastly, the Act repealed the Aliens Act, 1905, from such dates as might be specified by Order in Council, and such order was allowed to repeal any of its provisions on different dates, and, on the other hand, could incorporate any of the provisions of the repealed Act.

Women.—Before 1918 it was roughly true to say that women, while possessing full civil rights, had no civic or political rights beyond the municipal franchise and the capacity to hold certain local offices.

Since then two statutes have greatly enlarged their political status. By virtue of the Representation of the People Act, 1918 (as to the detailed provisions of which see pp. 386 *et seq.*), and the Sex Disqualification Removal Act, 1919 (c. 7), a woman can

now (1) vote, subject to certain restrictions, at Parliamentary elections and sit in the House of Commons; (2) vote at almost all local elections and hold nearly every office; (3) be a magistrate; (4) exercise any public function or be appointed to any civil or judicial office; (5) serve, and be required in certain instances to serve, as a juror; (6) be admitted to any incorporated society (*e.g.*, the Inns of Court) and subject to rules, to the civil service; (7) be admitted as a solicitor upon three years' service under articles, provided she has taken the qualifying university degree required of a man, or has qualified for such degree at any university not admitting women to degrees. Power is given to universities to admit women to membership or to any degree.

A peeress in her own right, however, cannot sit in the House of Lords, notwithstanding they were occasionally allowed to do so in early times (*Lady Rhondda's Case*, [1922] 2 A. C. 339).

CHAPTER IV.

THE LIBERTY OF THE SUBJECT.

Personal freedom of the subject.—Dicey opens his classical treatment of this subject by calling attention to a significant fact. The written Belgian Constitution, he points out, contains clauses guaranteeing to the subject freedom of the person, of discussion, of the Press, and so forth : and with these abstract declarations he contrasts the means by which our own Constitution secures the same rights. Under our Constitution liberty does not need to invoke the authority of any formal written enactment. First, every man is free to do what he will except in so far as the law otherwise provides. Secondly, this freedom is enforced, not by general declarations of rights, which are often ineffectual in practice, but by concrete remedies—writs, the issue of which the aggrieved party can compel, and thereby bring his oppressor to book. It is true that Magna Charta and other great constitutional treaties proclaim abstract rights, but in so doing they were merely declaratory of the existing common law.

Again, the French Constitution, while purporting to guarantee “liberty” in various forms, contains a provision enabling the Executive to declare a “state of siege,” and when a state of siege is declared the executive can disregard the ordinary law altogether. It is obvious how valueless any declaration of abstract liberty becomes to the subject in face of such an overriding power; and how much more effectively freedom is safeguarded by our own law, which knows no such thing as a state of siege—at least in time of peace (as to this see *infra*, Chapter VII.).

Redress of subject when deprived of liberty.—On wrongful deprivation of liberty, the following remedies are open to the citizen or the alien, viz. :—

1. The taking of civil proceedings for damages either in respect of malicious prosecution or false imprisonment or assault;

2. A criminal prosecution for assault, battery, or even in respect of false imprisonment itself (a).

3. In certain cases a summons can be taken out before a magistrate, under the Summary Jurisdiction Act, to recover costs incidental to defending irregular and unjustifiable proceedings.

4. The suing out a writ of *habeas corpus* to obtain one's release.

5. The issue in certain exceptional instances of a writ of certiorari or prohibition (b).

6. Appealing from the verdict of a jury to the Court of Criminal Appeal under the new Criminal Appeal Act, or from magistrates to quarter sessions.

The question of bail has long occupied the attention of the Legislature. The Bill of Rights provides that bail be not excessive, but leaves the fixing of the amount to the judicial officer. Magistrates may possibly now be able to refuse bail for any misdemeanour (see Costs in Criminal Cases Act, 1908), but they could not formerly refuse bail unless the prosecution costs were defrayed out of local funds.

Where a magistrate has a discretion as to the granting of bail he can fix it at any amount he chooses, but an appeal lies to a High Court judge sitting in chambers. Bail can be procured in a proper case where a prisoner is appealing against imprisonment awarded by a court of summary jurisdiction; and by the Criminal Justice Administration Act, 1914, the justice who has issued a warrant for the arrest of a prisoner can endorse on the back thereof the amount of bail a superintendent of police may accept. The judge can grant bail during a criminal trial before a jury, and even after a trial where the prisoner intends to appeal. Coroners can grant bail and also sheriffs, though the jurisdiction

(a) See Archbold's Criminal Pleading, p. 89.

(b) Statutory provision has also been made for obtaining one's liberty when sentenced to imprisonment by a magistrate for a summary offence, whereby release is obtained pending appeal, if one tenders recognizances or proper bail.

Power has also been given for the Metropolitan Police to discharge from custody on bail or on recognizances persons arrested for trifling misdemeanours when twenty-four hours must elapse before such persons can be brought before a magistrate. (10 Geo. IV. c. 44.)

(c) The subject is ably discussed in Kenny's Outlines of Criminal Law.

of the latter now devolves on justices of the peace save as to certain Revenue actions.

Bail can be given in cases of penalties due to the Crown, and which are now dealt with on the Revenue side of the King's Bench Division. Actions for penalties due in respect of customs are even now commenced by arresting the prisoner under a writ of *capias*, after which, to secure his liberty, he must obtain bail or give security.

Redress for false imprisonment and malicious prosecution.—As to redress for false imprisonment and malicious prosecution, the damages which are awarded may be vindictive, *i.e.*, the jury are permitted to mark their disapprobation of defendant's conduct by awarding damages which will punish and not merely compensate. No damages, however, can be recovered unless it can be shown that the defendant has acted maliciously, and without reasonable and probable cause.

It is a generally accepted opinion that where a man puts in motion the criminal law against another man the accused must be acquitted before he can sue for damages; it may be noted that where a statute provides a particular method of arrest, and an irregular arrest has been made in violation of the statute, the accused can recover damages (*Justice v. Gosling* (1852), 12 C. B. 39).

Arrest.—The general rule is that no man can be arrested or imprisoned except under due process of law. Where a person is suspected of serious crime, the usual course is to apply to a magistrate for a warrant for his arrest. That warrant can only be granted on a sworn information. In minor cases a summons is usually applied for, and if the person summoned does not appear a warrant can then be issued. But there are many cases where a person can be arrested without warrant, especially by a peace officer.

A constable may arrest where he has reasonable suspicion that his prisoner has committed felony, but a private person cannot do so unless he can show by way of defence that a felony has been in point of fact committed, or unless he does the act when called upon to assist the constable, or perhaps a justice of the

peace; or there has been a hue and cry (a general chase of a suspected person) (d).

The writ of habeas corpus and kindred writs at common law.—Prior to the Habeas Corpus Act there were various old writs designed to secure personal liberty to the subject under certain circumstances.

1. The writ of mainprize, whereby the sheriff was directed to take sureties for the appearance of a prisoner on a given occasion, and subject to such sureties (mainpernors) being forthcoming to set him temporarily at liberty (Blackstone, 21st ed., vol. 3, p. 121).

2. The writ *de odio et atia*, bidding the sheriff to hold an inquiry whether a prisoner accused of murder was committed on reasonable grounds for suspecting guilt or *propter odium et atiam*, and, if the sheriff found that prisoner was committed *propter odium et atiam*, to admit him to bail (*id.*, p. 128).

3. The writ *de homine replegiando*, directing the sheriff to replevy, *i.e.*, release, a person just as goods were and are repleviable in the action of replevin; sureties bound themselves before the sheriff that prisoner should appear and answer the charge against him.

4. The following *habeas corpus* writs were designed to secure temporary liberty, and for other purposes.

(d) Where an affray or breach of the peace accompanied by violence has been committed, any person present may interfere to part the combatants, and onlookers may hold a combatant till the temper of that combatant cools down, and they may also detain the combatants and afterwards hand them over to a constable at the first convenient opportunity. A mere threat to fight will not justify interference, for till it actually begins no arrest can take place, either by a constable or anyone else.

A person attempting to commit a felony may be arrested by a private person present at the time, and a policeman may arrest to prevent a breach of the peace, and on all occasions where a breach of the peace has been committed before him.

Where an indictable offence has been committed between 9 p.m. and 6 a.m., it appears that any person can arrest (14 & 15 Vict. c. 19, s. 11). Again, where an offence is committed directly against a person, a power to arrest is in many cases given to that person, and also to his servants. A magistrate may either arrest or order the arrest of a person committing a breach of the peace in his presence (Metropolitan Police Guide, 4th ed., p. 397).

There are also many statutes giving a power of arrest for particular offences either to constables or the public generally, or to specified persons.

(A) *Habeas corpus ad respondendum*, to bring up a prisoner in the custody of an inferior court to charge him with a fresh action in the superior court.

(B) *Habeas corpus ad satisfaciendum*, to bring up a prisoner against whom an adverse judgment had been obtained in an inferior court (*id.*, p. 129).

(C) *Habeas corpus ad recipiendum*, alias *habeas corpus cum causâ*, to bring up a defendant already in custody in an inferior court to do and receive what the King's Court shall deliver in that behalf (*ibid.*).

(D) *Habeas corpus ad subjiciendum*, directed to the person who had the prisoner in custody, commanding such person to produce the prisoner in court with the day and cause of detention, *ad faciendum subjiciendum et recipiendum*, whatever the court should ordain in that behalf. This was the writ which was improved upon by the Habeas Corpus Acts.

At common law there was a writ of *habeas corpus cum causâ*.

Where a prisoner was brought into his presence the judge, on release being demanded, had to satisfy himself that the captive was detained on some ground which would be valid in a court of law. The writ, however, was not particularly efficacious, as the gaoler to whom it was addressed could evade liability by proving change of prison as an excuse for non-production of the accused.

The numerous ways in which the right to a release could be evaded occasioned great indignation in the reign of Charles I., when Sir Thomas Darnell demanded his freedom on the ground of illegal detention. In this case venal judges held that the fact of Sir Thomas being detained by the royal command was quite sufficient, irrespective of any question of legality. Later on the Petition of Right provided unequivocally that the orders of the Sovereign were not in future to be sufficient justification for the imprisonment of his subjects. In the reign of Charles II. (1676) a man named Jenks was arrested, and afterwards, on a writ of *habeas corpus* being applied for, the court held that change of prison quarters amply exempted the governor of the prison from liability for not delivering up the prisoner. The treatment of the prisoner, who had been confined during the Long Vacation,

excited popular sympathy, and in 1679 the Habeas Corpus Act of that year (applying to criminal cases only) was passed.

Habeas Corpus Act, 1679.—This statute provides :—

1. That on complaint in writing by or on behalf of any person charged with any crime (unless he were committed for treason or felony plainly expressed in the warrant, or as accessory, or on suspicion of being accessory, before the fact to any petit treason or felony, &c., or unless he were convicted or charged in execution by legal process), the Lord Chancellor, or any of the judges in vacation, upon viewing a copy of the warrant, or upon affidavit that a copy is denied, shall (unless the party has neglected for the two whole terms after his imprisonment to apply to any court for his enlargement), award a writ of *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges, and upon service thereof the officer in whose custody the prisoner is shall bring him before the said Lord Chancellor, or other judge, with the return of such writ, and the true cause of the commitment, and thereupon, within two days after the party shall be brought before them, the said Lord Chancellor, or other judge, shall discharge the prisoner if bailable, or on giving security, to be fixed according to their discretion, to appear and answer to the accusation.

2. That such writs shall be endorsed as granted in pursuance of the Act and signed by the person awarding the same.

3. That the writ shall be returned and the prisoner brought up within a limited time, according to the distance, not exceeding in any case twenty days after service of writ.

4. That officers and keepers neglecting to make due returns or not delivering to the prisoner or his agent within six hours after demand a true copy of the warrant of commitment, or shifting the custody of the prisoner from one prison to another without sufficient reason or authority (see section 8), shall for the first offence forfeit £100 and for the second offence £200 to the party aggrieved, and be disabled to hold his office.

5. That no person once delivered by *habeas corpus* shall be re-committed for the same offence on penalty to the party aggrieved of £500.

6. That every person committed for treason or felony shall, if he requires it, the first week of the next term, or the first day of the next session of oyer and terminer, be indicted in that term or session, or else admitted to bail, unless it appear on oath made that the King's witnesses cannot be produced at that time; and if acquitted or not indicted or tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence; but that no person after the assizes shall be open for the county in which he is detained shall be removed from the common gaol by *habeas corpus* till after the assizes are ended, but shall be left to the justice of the judges of assize.

7. That any such prisoner may move for and obtain his *habeas corpus* as well out of the Chancery or Exchequer as out of the King's Bench or Common Pleas, and the Lord Chancellor or judge denying the same on view of the copy of the warrant or oath that such copy is refused shall forfeit severally to the party grieved £500.

8. That this writ of *habeas corpus* shall run in the counties palatine, the cinque ports and other privileged places, and the islands of Guernsey and Jersey.

9. That no inhabitant of England (except as in this section excepted) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, Tangier, or other place beyond seas within or without the King's dominions, on pain that the party committing, his advisers, aiders and assistants shall forfeit to the party grieved a sum not less than £500, to be recovered with treble costs, shall be disabled to have any office of trust or profit, and shall incur the penalties of a praemunire, and shall be incapable of receiving the King's pardon for any of the said forfeitures, losses and disabilities (e).

The defects of the above Act were as follows :—

1. There was no protection where the bail was fixed too high.
2. The return to the writ might not be truthful.
3. Illegal civil detention was ignored.

The Bill of Rights provides that bail be not excessive, and the

(e) This summary of the Habeas Corpus Act has been, by permission of the proprietors of the copyright, taken from Taswell-Langmead's Constitutional History, 5th ed., pp. 520, 521.

Bail Act, 1898, gives power to magistrates to admit persons to bail, with or without sureties, when such magistrates have power to grant bail under section 23 of the Indictable Offences Act, 1848; and by the Criminal Justice Administration Act, 1914, a magistrate who issues a warrant is empowered to state in writing on the back of such warrant the amount of bail he is prepared to accept, which bail may be taken before the superintendent of police.

By 56 Geo. III. c. 100, the Habeas Corpus Act has been extended so as to embrace cases of civil detention. By this Act judges are required, upon complaint made to them, to issue in vacation writs of *habeas corpus* returnable immediately, in cases other than for criminal matter, or for debt, or on civil process. Any person disobeying a writ sued out under the above Act is to be deemed guilty of a contempt of court, and becomes liable to be sent to prison for such contempt. Provision is further made that where on the face of it the return to the writ, which is addressed to the person detaining, shows a valid ground for the course pursued, the judge may yet go into the merits of the case.

Habeas corpus to places abroad.—The writ runs to the Channel Islands and Isle of Man (81 Car. II. c. 10, s. 10; 56 Geo. III. c. 100, s. 5), but it cannot issue into a British colony or foreign dominion of the Crown where a court of competent jurisdiction has been established. (See 25 & 26 Vict. c. 20.)

Uses to which the writ of habeas corpus has been put.—The writ of *habeas corpus* has been used to set free slaves during the period when slavery was lawful in England (f).

(f) Slavery was a legal institution in our country till the days of James I. In this reign one Caley claimed the horse of one Pigg, whom the defendant (Caley) alleged was his *villain regardant*. Pigg brought an action, and the court held in doubtful cases that slavery was obsolete, and that law was "in *favorem libertatis*." In or about 1772 one *Sommersett*, the slave of an English colonist, came to England with his master. As the master put him under arrest a writ of *habeas corpus* was applied for, and the court held that any slave who set foot in England became *ipso facto* free (Broom, *Constitutional Law*, p. 59). In the case of *The Girl Grace* (1827), 2 Hag. Adm. 94; Thomas, 110, a female slave accompanied her mistress to England, and then returned with her to the colony where she had been a slave. Here the court held that the fact of such voluntary return caused her to relapse into the

The provisions of the second Habeas Corpus Act have been made use of to restrain the rights of a parent over a child and a guardian over his ward. Where a father, as is almost universally the case, is the guardian of his child, he can generally enforce his rights to the custody of such child, though by comparatively recent legislation the rights of the mother are recognised also. Again, the mother of a bastard child can claim the custody of such child as against the reputed father by suing out a writ of *habeas corpus*. Where a father is unfit to have the custody of a child, the court will deprive him of such custody.

Modern practice as to writs of habeas corpus.—Where a writ has been sued out, the modern practice is either to instruct counsel to move the Divisional Court of the King's Bench Division or to apply by summons to a King's Bench Division judge sitting in chambers; but where the case is one of extradition, a motion must, except in vacation, be made by counsel to the Divisional Court (Crown Office Rules, 1906, r. 219). At the hearing the court may make either an order absolute for the issuing of the writ "*ex parte*," or may make an *order nisi*, thus giving an opportunity for the person detaining the prisoner to oppose. Where time is not of grave importance, a *rule nisi* is made, and the applicant then issues a summons, which is served on the respondent, at the hearing of which the judge determines whether or no he will accede to the application. The person to whom the writ is addressed, *i.e.*, the person detaining the prisoner in civil or criminal custody, is obliged to state in his return to the writ all causes for detention, if more than one, and it is not necessary to endorse these causes on the writ, as they may be set out in a

status of a slave. Slavery in English colonies has now been abolished, and Englishmen are forbidden, under pain of severe criminal punishment, to traffic in slaves, fit out ships to be used in the slave trade, or do various other things connected therewith. (See Stephen's Digest of Criminal Law, pp. 82—86.)

In the case of *Forbes v. Cochrane* (1824), 2 B. & C. 448; Thomas, 109, the liberty of a slave who escaped to a British ship was expressly recognised.

schedule which must be annexed to the writ (Crown Office Rules, 1906, r. 222).

A prisoner or anyone suing out process on his behalf may impeach the return to the writ by affidavit (*The Canadian Prisoners' Case* (1839), 3 St. Tr. (N. S.) 963).

When the person detained is produced in court or chambers the judge may either—

1. Make no order at all.
2. Discharge the person detained.
3. Award bail.

In the case of *R. v. Richards* (1844), 5 Q. B. D. 926, it was held that where a commitment order is disputed for a reason which is purely technical, a properly drawn up warrant or order may be substituted for the original one. In the above case the return stated that the prisoner was committed to gaol for three months by the order of a magistrate. The warrant of commitment recited a conviction which was bad on its face. The return further stated that a week after the committal, whilst the prisoner was still in custody, the same magistrate delivered to the gaoler a fresh warrant of committal relating to the same offence, in which the matter was put right. The court held that the prisoner was not entitled to be discharged from custody, as the return disclosed a good warrant for his detention. (See *R. v. Allen* (1860), 30 L. J. Q. B. 38, as to warrant irregularly signed.)

In *R. v. Halliday*, [1917] A. C. 260, Zadig, the applicant, a German by birth, was naturalized in England in 1905. During the war he was, by virtue of a regulation made under the Defence of the Realm Act, 1914, interned as a person of hostile origin and association. Proceedings were taken, and finally the matter came before the House of Lords, where by a majority the action of the Secretary of State was supported. The case is a remarkable one on account of the divergence between the regulation and the Act conferring the power to make it. Lord Finlay supported the action of the Executive, but Lord Shaw, in a noteworthy speech, expressed the view that the action taken against Zadig was not only *ultra vires* but an invasion of the liberty of the subject. The Defence of the Realm Act gave general powers to

the Executive, and though a decision of the House of Lords is binding, it is still open to doubt whether a regulation permitting a British subject to be imprisoned on account of hostile origin or associations, and not only to be imprisoned but to be kept in prison indefinitely without trial, was justifiable in an ethical sense. The Executive, all things considered, were perhaps justified, but this is a mere matter of opinion. In another case a woman who was a natural-born subject, but who had perhaps been imprudent in the choice of her associates, and on whose premises suspicious documents were found, was interned as a person of hostile origin or association. This was a case of arbitrary imprisonment without trial in the opinion of vigorous asserters of the liberty of the subject. Another important case was that of Art O'Brien, who was sent in custody to the Irish Free State by virtue of a regulation made under the Restitution of Order in Ireland Act, 1920, and was set at liberty by the Court of Appeal in proceedings by writ of *habeas corpus*. The case, which ultimately went to the House of Lords, was remarkable in two ways : (1) The fact of such writ being directed to the Home Secretary instead of to the governor of the gaol being approved ; (2) The decision that where imprisonment has been held to be illegal, no further appeal can be permitted, even though the order of the Court does not go so far as to order the discharge of the prisoner from custody. The reason for the discharge of the prisoner was that the Irish Free State Constitution Act, 1922, repealed partially, by implication, the Restoration of Order in Ireland Act, 1920.

Appeal to the Court of Criminal Appeal (g).—The new Criminal

(g) *Court for Crown Cases Reserved*.—This Court was established by 11 & 12 Vict. c. 78, s. 1, and lasted till the Criminal Appeal Act, 1907, came into force. Prior to the establishment of this Court it was the practice of judges to reserve points of law in favour of a prisoner for the opinion of their colleagues, and there were informal gatherings of judges at which counsel for both sides were present. By 11 & 12 Vict. c. 78, s. 1, where a person shall have been convicted of any treason, felony, or misdemeanour, the judge at the trial might at his discretion reserve a point of law for the consideration of a tribunal of common law judges to be called the Court for Crown Cases Reserved. There was no obligation on the part of the judge to reserve a point, and if he did not, the only remedy was to petition the Sovereign. The judges might consist of any uneven number between three and thirteen, and the verdict of the majority prevailed. This Court was not affected by the Judicature

Appeal Act, 1907 (c. 23), does not interfere with the right of the Crown to pardon or commute criminal sentences. It provides, *inter alia*, that a person convicted on indictment may appeal to the Court of Criminal Appeal against his conviction on any ground of appeal involving a question of law; and where the leave of the Criminal Appeal Court has been obtained, or the judge who tries the case awards to the prisoner a certificate authorising appeal, such prisoner may appeal on any question of law and fact, or fact alone, provided the court is satisfied that the ground of appeal is a sufficient one. A convicted man may also by leave appeal against his sentence, unless such sentence is one fixed by law; but where a sentence is appealed against, a more severe one may be passed by the Appeal Court.

Persons found by the magistrates at petty sessions to be incorrigible rogues, after being sentenced at quarter sessions can appeal to the Court of Criminal Appeal (see Criminal Appeal Act, 1907), and by the Criminal Justice Administration Act, 1914, persons sentenced to Borstal treatment have the like privilege.

The court has power, whenever a conviction is appealed against, to dismiss the appeal, notwithstanding the fact that they are of opinion that the point relied on by the appellant is sound, provided they also think that no substantial miscarriage of justice has occurred (section 4, sub-section 3).

Notice of appeal must be given within ten days after conviction, and no sentence either to death or corporal punishment can be executed till the time for giving notice of appeal has expired, or, where notice of appeal has been given, until the appeal has been heard. The court may examine witnesses if they think fit, and may admit the prisoner to bail pending appeal. An appeal lies from the Criminal Appeal Court to the House of Lords in certain cases.

Where the Home Secretary has received a petition for pardon on behalf of a convicted prisoner, he may submit the case, or any point arising thereon, for the opinion of the Court of Appeal (section 19).

Acts. Quarter session judges and recorders could reserve points just as a superior Court judge could.

Appeals from sentences to imprisonment passed by magistrates.—By the Summary Jurisdiction Act, 1879, s. 19, an appeal lies to the Court of Quarter Sessions on the merits where a person has been sentenced to imprisonment without the option of a fine by magistrates.

There are also, in certain cases, remedies against erroneous convictions by writs of certiorari, and magistrates may furthermore be required to state a case on a point of law for the opinion of the High Court.

The right to trial by jury.—By the Summary Jurisdiction Act, 1879, s. 17, a person charged with an offence in respect of which he is liable to be imprisoned for a term exceeding *three months* (cases of assault excepted) can demand to be tried before a jury, and magistrates have to inform prisoners of their rights in this respect, and where the accused is a child of tender years his parent or guardian may exercise this option of trial by jury on his behalf. For the history of criminal and civil juries, see Appendix C.

Powers of detention in non-criminal cases.—Children, lunatics and persons incapable of taking care of themselves—as, for instance, a man suffering from delirium—can, of course, be restrained for their own protection. So, too, persons suffering from dangerous infectious illness may, under recent legislation, be compulsorily isolated, and habitual drunkards may, under certain conditions, be committed to a reformatory or, with their own consent, be detained for a specified period in a retreat.

Use of force.—The Criminal Code Bill Commissioners, in their report dated 1878, state as follows:—"We take one great principle of the common law to be that though it sanctions the defence of a man's liberty and property against illegal violence, and permits use of force to prevent crimes, to preserve the public peace, and bring offenders to justice, yet all this is subject to the restriction that the force used is necessary: that the mischief sought to be prevented could not be prevented by less violent means, and that the mischief done be only what might be reasonably anticipated from the force used, and not be disproportionate to the mischief which it is intended to prevent."

Mr. Serjeant Stephen, in his Commentaries, states as follows :—“ In the case of justifiable self-defence the injured party may repel force by force in defence of his person, habitation, or property against anyone who manifestly intends, or endeavours with violence or surprise, to commit a felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he find himself out of danger, and if in a conflict between them he happens to kill, such killing is justifiable.”

Stephen, J., says :—“ The intentional infliction of force is not a crime when it is inflicted by any person to arrest a traitor, felon, or pirate who has escaped, or is about to escape, from such custody, although such traitor, felon, or pirate offers no violence to any person ” (Digest of Criminal Law, p. 158).

Force, again, may be used by a father to protect a son; by a husband to protect a wife; by a son to protect a father; and generally the strong may come to the assistance of the weak without breaking the law.

Reasonable assault and battery may be committed with impunity when one is acting (1) in defence of person or property; (2) when one occupies a peculiar relationship to the person assaulted or beaten, *e.g.*, a father may moderately chastise his child; (3) in the preservation of the public peace.

CHAPTER V.

LIBERTY OF DISCUSSION.

British subjects in the United Kingdom may speak and publish what they choose provided that the law is not infringed.

The law of liberty of discussion is chiefly concerned with defamation, sedition, blasphemy, and obscenity. Defamation denotes publishing, orally or in writing, defamatory matter concerning a person, such defamatory matter being calculated to prejudice him in his calling or trade or to hold him up to ridicule, hatred or contempt.

Where the defamatory matter is either written, printed, or consists of a picture, effigy, or assumes some other permanent form, it is libel; where it is oral, it is slander.

Defamatory libel calculated to bring about a breach of the peace is a criminal as well as a civil offence, but slander, except in rare instances, is only a civil wrong.

(For the distinctions between libel and slander and other useful information, see Odgers, Common Law, ch. 10).

Truth, again, is a defence to a civil action for libel, and also to one for slander, but it is no defence to a criminal libel unless defendant can prove truth and that publication was for the public good.

Publication is the communication of defamatory matter to a person other than the one defamed, and affects the author, the printer, the publisher, the communicator, and even the careless seller of a libel, and also the originator and the repeater of a slander. No publication to a third person is necessary to obtain a conviction for criminal libel.

Privileged communications.—Certain communications are absolutely privileged, *i.e.*, they are under no circumstances punishable civilly or criminally, whilst other statements are only privileged if they are not malicious in fact.

The following are absolutely privileged :—

- (1) Judicial proceedings, including documents necessary to the case of a litigant, and also all proceedings in a court, freedom of speech being accorded to judges, counsel, and other advocates, litigants conducting their cases in person, and witnesses (cf. *Royal Aquarium Co. v. Parkinson*, [1892] 1 Q. B. 451). But a witness is not protected in respect of statements made before he is sworn or after leaving the box (*Trotman v. Dunn* (1815), 4 Camp. 211). As to privileges of judges, see p. 34. In *Munster v. Lamb* (1883), 11 Q. B. D. 588; Thomas, 156, it was held that an advocate cannot be sued for defamation because he has made use of violent language in open court whilst actually conducting a case, even though the language be spiteful and dictated by personal antipathy. Where he goes beyond proper bounds he can be committed for contempt of court (*Ex parte Pater* (1864), 5 B. & S. 299). A man who is conducting his defence is allowed considerable latitude, especially if the charge is a criminal one, but instances have occurred of prisoners being fined for conduct of this kind (cf. *R. v. Davison* (1821), 4 B. & Ald. 329). In certain criminal cases evidence of a previous conviction is admissible before the jury have given their verdict, but only in certain specified instances, e.g., where the prisoner or his advocate has attacked with unnecessary violence the prosecutor or his witnesses, evidence of such previous conviction may be given (Criminal Evidence Act, 1898). *Ex parte* proceedings are those where only the applicant is present, and when applications of this kind are made in open court they afford opportunities for vindictiveness and malice. In *Kimber v. The Press Association* (1893), 62 L. J. Q. B. 152, the plaintiff was a professional gentleman of respectability, and application for criminal process against him was made to a country bench of magistrates, Though the application was refused, Mr. Kimber sustained damage and sued for defamation, but lost his case because the magistrates, in the exercise of their discretion, heard the matter in open court.

The publication without malice of a fair and accurate report of proceedings in open court before magistrates upon the *ex parte* application for the issue of a summons is privileged (*ibid.*). For further information the reader is referred to the cases of *Ponsford v. The Financial Times* (1900), 16 T. L. R. 248; *Chaloner v. Lansdown* (1894), 10 T. L. R. 290; *Adam v. Ward*, [1917] 2 A. C. 332; *Usill v. Hales* (1878), 3 C. P. D. 319; *Thomas*, 159; *Davison v. Duncan* (1857), 26 L. J. Q. B. 104; *Thomas*, 161; *Curry v. Walter*, *Thomas*, 159.

- (2) Words uttered in either House of Parliament by members (see *post*, p. 291 *et seq.*).
- (3) State communications, which include, possibly, statements made by all persons in government employ as to State business.
- (4) Proceedings at a court-martial or a military enquiry (*Dawkins v. Rokeby* (1875), 7 H. L. 544).
- (5) Reports made in pursuance of military duty (*ibid.*).
- (6) Fair and accurate reports in newspapers of proceedings publicly heard before a court exercising judicial authority if published contemporaneously and neither blasphemous nor indecent.
- (7) Reports and other documents published by order of either House of Parliament (see p. 302 *et seq.*).

The following communications are privileged in a qualified sense :—

- (A.) Communications made in pursuance of a legal, social, or moral duty (cf. *Stuart v. Bell*, [1891] 1 Q. B. 530).
This may possibly include communications by a government official to his superior.
- (B.) Statements in his own defence by a man who has been attacked (cf. *Koenig v. Ritchie* (1862), 3 F. & F. 413).
- (C.) Communications between persons possessing a common interest (*Hunt v. G. N. Railway*, [1891] 2 Q. B. 191).
- (D.) Reports of judicial proceedings not covered by section 3 of the Law of Libel Amendment Act, 1888. These are not privileged if inaccurate, biased or not published *bona fide*, or when blasphemous or indecent. This privilege is not

confined to newspapers, and includes reports of *ex parte* proceedings.

No protection exists when the publication of proceedings is prohibited by order of court.

- (E.) Faithful and correct reports of parliamentary debates, and also fair and reasonable comments by public writers on matters of public interest (see *Wason v. Walter* (1868), L. R. 4 Q. B. 73) (a).
- (F.) Fair and accurate reports in any newspaper of the proceedings of a public meeting or (except where neither the public nor newspaper reporters are admitted) of a meeting of any vestry, town council or other public body mentioned in section 4 of the Law of Libel Amendment Act, 1888, or of documents published at the request of any government department or any official specified in the Act. A public meeting, for the purposes of the Act, is any meeting *bona fide* and lawfully held for a lawful purpose, whether admission thereto be general or restricted.

Press privilege.—The statutory defence of apology is an important concession to the Press and persons interested in periodical publications. Defendant may prove by way of defence absence of malice and gross negligence, and also that a full apology has been inserted at the earliest opportunity or, where the above course is impossible, the making of a full apology has been offered.

Payment of money into Court by way of amends must also be made. (For further particulars, see R. S. C., Ord. XXII., rule 1.)

When journalists are charged with criminal libel they may be dealt with summarily where the libel is trivial, and fined up to £50 (Newspaper Libel, &c., Act, 1881, ss. 4 and 5).

In newspaper actions defendant may prove in mitigation of damages that plaintiff has received, or has agreed to receive,

(a) It is perhaps doubtful whether the defence of fair comment comes under the heading of qualified privilege, but it is one of those topics which concern the constitutionalist and yet cannot be dealt with conveniently in outline. The reader is therefore referred to Odgers's Common Law, 2nd ed., vol. 2, pp. 527 to 530.

compensation from other sources (Law of Libel Amendment Act, 1888, s. 6).

Censorship of stage plays.—From the time of Henry VIII. downwards, the drama has been controlled by the Executive. Under the Theatres Act, 1843, the Lord Chamberlain has a jurisdiction—(1) to forbid the performance of unlicensed stage plays anywhere; (2) to license theatres in certain places. He has an arbitrary right under the Theatres Act, 1843, to prohibit any stage play whenever he thinks its public performance would militate against good manners, decorum and the preservation of the public peace; and in order that he may exercise complete supervision, all new plays and all old plays which have been altered must be submitted to him, and fees for perusal paid. He has local jurisdiction to license all theatres in the cities of London and Westminster, in Finsbury, Marylebone, the Tower Hamlets, and also in Windsor and other places where the King possesses a royal residence.

The county councils license places to be used in their counties, and at Oxford and Cambridge the university authorities possess a veto as to the performance of plays within their respective jurisdiction. (Report of the Joint Committee of the Lords and Commons, November 8, 1909.)

Blasphemy.—The late Mr. Justice Stephen says :—" Every publication is said to be blasphemous which contains matter relating to God, Jesus Christ, the Bible, or the Book of Common Prayer, intended to wound the feelings of mankind, or to excite contempt and hatred against the Church, or to promote immorality.

" Publications intended in good faith to propagate opinions on religious subjects, which the person publishing them regards as true, are not blasphemous within the meaning of the definition merely because their publication is calculated to wound the feelings of Christian people, or because their general adoption might tend by lawful means to alterations in the constitution of the Church as by law established." " Blasphemous writings," he continues, " are libels, and also misdemeanours " (Digest of Criminal Law, p. 125).

Denial of Christian truths.—The learned judge also mentions another offence dealt with by 9 Will. III. c. 32, whereby persons educated in or professing the Christian doctrines incur various disabilities and punishments when they, by writing, printing, teaching, or ill-advised speaking, deny the truth of the Christian religion or the Holy Scriptures or their Divine authority. He also mentions the misdemeanours of depraving the Lord's Supper (see Digest of Criminal Law, p. 128; see also 1 Edw. VI. c. 1, s. 1) and defaming the Book of Common Prayer (see Digest of Criminal Law, p. 128).

Blackstone mentions the offence of apostacy or denial of the Christian truths, and also heresy or denial of some essential doctrine of Christianity; but all these offences are now practically obsolete, blasphemy excepted (*b*).

The offence of profane and common swearing is quoted by Blackstone, and also Stephen, as an offence against religion, and they tell us that it is a misdemeanour punishable by a small fine or a short alternative period of imprisonment. This offence is obsolete, save in so far as it may come within the range of certain by-laws.

Obscenity.—It is a misdemeanour to write, make and publish obscene and criminal books, pictures, &c., when the writing, picture, effigy, &c., has a tendency to deprave and corrupt those whose minds are open to immoral influence (*R. v. Hickling* (1868), 11 Cox, 26). Purity of motive is no excuse for the publication of indecent matter (*ibid.*).

Uttering obscene words before a large number of persons may also constitute a misdemeanour (Odgers on Libel, 5th ed., pp. 505 *et seq.*).

Exhibiting publicly for sale or otherwise indecent writing &c., is criminal, but not mere possession of same (*id.*).

In *R. v. Bradlaugh and Besant* (1878), 3 Q. B. D. 569, an indictment for obscene libel was quashed because the indecent matter constituting the libel was not set out at full length, but

(b) Persons are still, in theory, liable to censure and punishment at the instance of an ecclesiastical court for fornication, adultery, and other deadly sins, and also for heresy, according to Prof. Maitland; but these proceedings are also obsolete (see Stephen's Digest of Criminal Law).

by the Law of Libel Amendment Act, 1888, it appears to be no longer necessary to do this.

By the Post Office Act, 1870 (c. 79), the Postmaster-General, with the consent of the Treasury, may make regulations for stopping in the post the transmission of indecent matter.

It is also a misdemeanour to send by post indecent writings, prints, cards, &c. (Post Office Protection Act, 1884 (c. 76)).

By the Indecent Advertisements Act, 1889 (c. 18), it is a summary offence to place an indecent advertisement or to write indecent words or otherwise publish indecent matter on any building, wall, gate, public urinal, &c.

By 20 & 21 Vict. c. 83, s. 1, any court of petty sessions on complaint on oath being made that any obscene documents are in any house or other place for sale or other purpose of gain may issue a search warrant to have such articles searched for, seized and brought into court. A summons can then be issued against the occupier of the place in question to show cause why such articles should not be destroyed, and they may be destroyed after the time for appeal has expired unless cause be shown to the contrary.

There are certain formalities to be complied with as to the drawing up of the order, and the court must be satisfied that the works, &c., are obscene before granting the search warrant, and there must be some evidence of sale or exhibition for purposes of gain.

CHAPTER VI.

THE RIGHTS OF PUBLIC ASSOCIATION AND PUBLIC MEETING.

Liberty of association.—The general rule of English law allows complete liberty of association for any lawful object—*e.g.*, people may combine to form a club or society or a partnership without any permit from the Government and without fulfilling any legal formality. But various statutes have restricted this common law freedom—*e.g.*, a club which supplies intoxicating liquors must be registered and comply with certain formalities; a trading company must not consist of more than twenty members, or a banking company of more than ten, unless it registers under the Companies Acts.

The right to combine has formed the subject of considerable controversy, and there are four important statutes on the subject, *viz.*, the Trade Union Act, 1871, the Conspiracy and Law of Property Act, 1875, the Trade Disputes Act, 1906, and the Trade Union Act, 1913.

Industrial disputes and kindred matters are capable of assuming such serious dimensions as to threaten the tranquillity of the State, and therefore they demand the attention of the Executive and the Legislature.

A combination of persons to effect any common purpose is *prima facie* legal. But a combination to do an unlawful act, or to do a lawful act by unlawful means, is an actionable conspiracy.

Before the Trade Disputes Act, 1906—a statute subject to which many important decisions must be read—there were the following important cases decided: the *Mogul Case* (1889), 23 Q. B. D. 598, where it was held that persons might combine to keep trade in their own hands when not actuated by a malicious motive, though the acts done necessarily injured a rival in trade; *Allen v. Flood*, [1898] A. C. 531 (a case not involving a combination of persons), where it was held that where the act complained of was legal the fact of a defendant being actuated by a malicious motive was immaterial; *Quinn v. Leathem*, [1901]

A. C. 495, where it was held that "a combination of two or more, without justification or excuse, to injure a person in his trade by inducing customers or servants not to deal with him or continue in his employment, thus causing him damage," was illegal; *Pratt and Others v. British Medical Association*, [1919] 1 K. B. 244, where it was held that to procure the boycotting of a medical man by his fellows by intimidating other members of the profession into abstaining from ordinary professional dealings with him (e.g., from meeting him in consultation) was illegal. Here the judgment of McCardie, J., in the Court below was upheld by the Court of Appeal; *Ware v. The Motor Association*, [1921] 3 K. B. p. 40), where it was held that the defendant association could fix retail prices for cars and publish black-lists of traders who declined to be guided by their rules, and see now *Sorrell v. Smith*, *The Times*, May 16, 1925, judgment of the House of Lords.

It is not easy to reconcile these decisions, particularly as to the effect of a malicious motive on the part of the defendants, upon the legality of their action. It would seem, though, that the principle upon which they are all really founded is this: the defendants' act is lawful where their governing aim is the promotion of their own legitimate common interest, notwithstanding that such promotion involves deliberate damage to the interests of others. The defendants' act is unlawful where damage is inflicted upon others out of spite, and the promotion of the alleged common interest is a mere pretext for its indulgence. What is here referred to as the promotion of a legitimate common interest is often called, in the decisions, "lawful justification or excuse."

In some of the above cases, e.g., *Allen v. Flood* and *Quinn v. Leathem*, there was a suggestion that an act which if done by an individual would afford no cause of action might be actionable if done by a number of persons acting in combination. At the time of these decisions the Conspiracy and Protection of Property Act, 1875, was in force. Section 3 of this Act relieves of criminal liability any persons who combine to do, in contemplation or furtherance of a trade dispute, any act which would not be punishable as a crime if done by one person.

The Trade Disputes Act, 1906, effected three important

changes in the law. First, it extended the immunity just referred to to civil proceedings (section 1). Secondly, it provides that the act of inducing A to break a contract with B (which is a tort in ordinary circumstances) shall not be actionable if done in contemplation of a trade dispute. Thirdly, apart altogether from any question of a trade dispute, it relieves trade unions (by section 4) from all liability in respect of any tortious act alleged to have been committed on their behalf.

Of considerable importance in a constitutional sense is the practice of trade unions diverting the subscriptions of their members to political purposes without their consent. In *Amalgamated Society of Railway Servants v. Osborne*, [1909] A. C. 87, it was held in the House of Lords that "there was nothing in the Trade Union Acts from which it could be reasonably inferred that trade unions were meant to have the power of collecting and administering funds for political purposes, and that a rule purporting to confer on a trade union registered under the Act of 1871 a power to levy upon members contributions for the purpose of securing parliamentary representation, whether it were an original rule of the union or subsequently introduced, was *ultra vires* and illegal."

By the Trade Union Act, 1913, restrictions have been imposed (section 3) on the application of funds for certain political purposes, and a member may at any time give a formal notice according to the terms of the Act that he objects to contribute to the political fund of the union. Section 3 also provides that the contributions of members shall not be applied for political purposes unless a ballot has been taken.

The Emergency Powers Act, 1921 (see Appendix) enables his Majesty by proclamation to make regulations creating summary offences punishable by fine or imprisonment, or both, when the tranquillity of the State has been disturbed by combinations which have a tendency to deprive the general public of fuel, light, food, or the means of locomotion.

There are numerous other associations forbidden by law, *e.g.*, gambling clubs, but it may be mentioned that it is a criminal conspiracy to raise the price of stocks by circulating false rumours (*R. v. De Berenger* (1814), 3 M. & S. 67).

General right of public meeting.—It is a rule of English law that any given person can meet another given person or an indefinite number of persons at any appointed place so long as the law is not thereby broken. As a rule, people may assemble in any numbers in a *private* place for a lawful object, provided they do not become a nuisance to others or break the law. To understand the legality of any given public meeting it will be necessary to enquire into the law as to unlawful assemblies, routs and riots (cf. *R. v. Vincent*, 9 C. & P. at p. 109).

Unlawful assemblies.—Mr. Serjeant Stephen defines an unlawful assembly as “a meeting of great numbers of people with such circumstances of terror as cannot but endanger the peace, and raise fears and jealousies amongst the subjects of the realm.”

It has been decided that where persons assemble to witness a prize fight the assembly is an unlawful one (*R. v. Billingham* (1825), 2 C. & P. 234).

Where, however, people assemble for a lawful object without intending to commit a breach of the peace, though they have reason to believe that there will be such a breach in consequence of their meeting being opposed, such persons do not, according to the decision in *Beattie v. Gillbanks*, constitute an unlawful assembly (*Beattie v. Gillbanks* (1882), 9 Q. B. D. 308).

In this case a certain section of the Salvation Army marched about the streets of Weston-super-Mare singing hymns and disturbing the tranquillity of owners and occupiers of property in that town. An opposition army, called the Skeleton Army, was accordingly raised to oppose them. Fearing a disturbance, the local magistrates caused a notice to be served on the Salvationists not to assemble. In spite of this notice the assembly was persisted in. The two armies met, and a breach of the peace occurred. One Beattie, the commanding officer of the Salvationists, was convicted of being a member of an unlawful assembly by the bench, but the conviction was reversed on appeal by the Divisional Court for the reason above stated.

The case of *Wise v. Dunning*, [1902] 1 K. B. 167, presents the law in a different aspect, however. Here the plaintiff was a conscientious but violent denouncer of “the scarlet woman and

her creed." Clad in a peculiar costume, he gave religious addresses in places of public resort in Liverpool.

Certain Roman Catholics taking umbrage at these meetings and street brawls resulting, the magistrate bound Wise over to keep the peace and be of good behaviour. Proceedings were taken, on the hearing of which Darling, J., gave judgment to the following effect:—"To begin with, we have the appellant's own description of himself. He calls himself a crusader who is going to preach a Protestant crusade. In order to do this he supplied himself with a crucifix, which he waved about. . . . Got up in this way he admittedly made use of expressions most insulting to the faith of the Roman Catholic population. . . . There had been disturbances and riots caused by this conduct . . . and the magistrate has bound him over to be of good behaviour, as he considered that the conduct was likely to occur again. Large crowds assembled in the streets, and a riot was only prevented by the police. The kind of person which the evidence here shows the appellant to be I can best describe in the language of Butler. He is one of—

‘That stubborn crew

Of errant saints whom all men grant
To be the true church militant;
A sect whose chief devotion lies
In odd perverse antipathies.’”

Finally the learned judge upheld the opinion of the magistrate. At first sight the case of *Wise v. Dunning* appears to overrule *Beattie v. Gillbanks*, but this is not a correct view, as will appear by the remarks of the judges in *Beattie v. Gillbanks* (1901), 71 L. J. K. B. 165. Field, J., said: "The finding of the justices amounted to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition." In *Wise v. Dunning* Lord Alverstone said: "No reasonable man . . . can doubt that the police and the magistrate rightly concluded that the appellant, by holding these continual meetings attended by increasing crowds, by using language insulting to a religious sect to which the larger number of persons present might belong, and by inviting his own supporters to give him protection,

went very far indeed towards inciting the people, at any rate, to so behave as to occasion a breach of the peace.”

Forbidden acts in places of public resort.—A crowd of persons cannot block up public thoroughfares or interfere with the general comfort of other persons lawfully using such place; neither can a man cause a crowd to assemble to the annoyance of owners and occupiers of adjacent land or houses.

By the Parks and Gardens Act (35 & 36 Vict. c. 15) provision is made for, *inter alia*, securing the enjoyment of the ordinary frequenters by giving power to make by-laws; and as to several of these parks penalties are imposed under by-laws for the delivery of any public address.

By the Municipal Corporations Act, 1882, borough councils can make by-laws for the general good government of the borough.

The same sweeping power has been conferred on county councils by the Local Government Act, 1888.

By the Local Government Act, 1894, certain powers of making by-laws respecting recreation grounds have been accorded to parish councils.

Meetings in London.—Some persons are under the impression that meetings may be held in Trafalgar Square to discuss grievances, but a reference to the case of *R. v. Graham and another* (1888), 16 Cox, 420, will convince them that they are wrong (a).

(a) The case of *R. v. Graham and another* is most important on account of the dicta of Mr. Justice Charles. One of the principles the learned judge laid down was to the following effect: “The law recognises no right of public meeting in a public thoroughfare—a public thoroughfare being dedicated to the public for no other purpose than that of providing a means for the public passing and repassing along it. A place of public resort is analogous to a public thoroughfare; and although the public may often have held meetings in places of public resort without interruption by those having control of such places, yet the public have no right to hold meetings there for the purpose of discussing any question whatever, social, political, or religious” (see headnote from which this extract is taken, *R. v. Cunningham Graham and another*, 16 Cox, 420).

In the same case the same judge defined a riot as “a disturbance of the peace by three persons at least, who act on intent to help one another against any persons who oppose them in the execution of some enterprise (lawful or unlawful), and actually execute that enterprise in a violent and turbulent

By 57 Geo. III. c. 19, the convention, or giving notice for the convention, of any meeting consisting of more than fifty persons, or for more than fifty persons to assemble in any street, square, or open space in the city or liberties of Westminster or county of Middlesex, within the distance of *one mile* from the gate of Westminster Hall, except such parts of the parish of St. Paul's, Covent Garden, as are within the said distance, to consider or prepare any petition or address to the King or either House of Parliament for the alteration of matters in Church or State, on any day on which the two Houses shall sit or be adjourned to sit, or on any day on which His Majesty's Court of Chancery, King's Bench, Common Pleas and Exchequer, or any of them, shall sit in Westminster Hall, is to be deemed unlawful, and the meetings, if held, are unlawful assemblies.

It is doubtful whether a meeting can be held within a mile, as the crow flies, of the Law Courts, as the Judicature Act, 1873, says that expressions in former Acts of Parliament referring to the old courts are to refer to the new High Court of Justice.

Tumultuous petitioning.—By 13 Car. II. stat. 1, c. 5, no person shall solicit the signatures of upwards of twenty persons to any petition to the King or either House for alteration of Church or State matters without previously obtaining the consent of one or other of the authorities mentioned in the Act. Furthermore, no persons above the number of ten shall repair to His Majesty or both Houses or either House of Parliament upon the pretence of delivering any petition or complaint, &c. The penalty for this offence is a fine up to £100 or three months' imprisonment, and the offender is to be tried within six months after committal of offence. Three witnesses are necessary to secure a conviction.

Revolutionary and dangerous meetings.—In order to put a stop to meetings of a mischievous character at which oaths are administered to members of a particular society, the following

manner, to the alarm of the people" (*R. v. Graham and another*, 16 Cox, 420).

statute was passed. 37 Geo. III. c. 123, provides that "Every person who shall in any manner or form administer, cause to be administered, or aid or assist or consent to the administering of any oath or engagement, or shall take any oath or engagement to embark in any seditious or mutinous purpose, or to break the peace, or belong to any society formed for such purpose, or to obey any leader or body of men not having by law authority for that purpose, or not to reveal any unlawful federation or combination, or any unlawful act done or to be done, shall be guilty of felony." The punishment prescribed is penal servitude not exceeding seven years (see, further, Russell on Crimes).

Unlawful drilling.—By 60 Geo. III. & 1 Geo. IV., c. 1, s. 1, persons attending illegal meetings for drilling or training in the use of arms, or practising military evolutions without authority from the King, or the lords lieutenants, or two justices for the county, riding, or borough, are liable to fine and imprisonment not exceeding two years.

A prosecution must take place within six months, or not at all.

Public Meeting Act.—By the Public Meeting Act, 1908 (c. 6), disorderly conduct at any lawful public meeting is punishable by fine not exceeding £5 or imprisonment not exceeding one month, and in the case of a political meeting between issue of the writ for the return of a Member of Parliament and the return, the offence is an illegal practice within the meaning of the Corrupt Practices Act of 1883.

CHAPTER VII.

ROUTS AND RIOTS AND MARTIAL LAW.

A rout is defined by Mr. Serjeant Stephen in his Commentaries as a disturbance of the peace by persons assembling together with an intention to do a thing which, if it be executed, will make them rioters, and actually making a motion towards the execution thereof (Commentaries, 14th ed., vol. 4, p. 174).

There must be three or more persons engaged to constitute a rout. The same learned author defines a "riot" as a tumultuous disturbance of the peace by three persons or more assembling together of their own authority with an intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner to the terror of the people, whether the act intended be of itself lawful or unlawful. A rout is a misdemeanour, like an unlawful assembly, and so is a riot in the first instance, though a riot may very easily become a felony, *e.g.*, where rioters burn a house or injure property.

In order to constitute a riot five elements are essential : (1) three or more persons ; (2) a common purpose ; (3) execution or inception of the common purpose ; (4) intent to help one another by force if necessary against anyone who may oppose them in the execution of the common purpose ; (5) force or violence displayed in such a manner as to alarm at least one person of reasonable firmness (*Field v. Receiver of Metropolitan Police*, [1907] 2 K. B. 858). Where damage has been caused by rioters the inhabitants of the hundred had to compensate persons who had lost property owing to the conduct of the rioters, but the law on this subject is now regulated by the Riot Damages Act, 1886, which provides that where a house, shop, or building in any police district, or the property therein, has been stolen, lost or injured owing to a riot, compensation to the persons aggrieved

is to be paid out of the police rate. In *Ford v. The Receiver for the Metropolitan Police District*, [1921] 2 K. B. 344, the facts were as follows: During the Peace Night in 1919, a good-humoured crowd entered an empty house and took away the woodwork and flooring to make a bonfire. A next-door neighbour told some of the mob that he hoped they would not touch his house, but made no attempt to prevent damage being done to his neighbour's house, alleging that he apprehended injuries should he interfere with the crowd. The Court held that the conduct of the crowd was a riot, that the transaction embraced all the five ingredients of a riot, that the next-door neighbour was a man of reasonable courage, and that he had been alarmed. Damages should therefore come out of the police rate. In *Pitchers v. Surrey County Council*, [1923] 2 K. B. 415, it was held that a mutinous disturbance created by soldiers in a camp where a civilian owned property, the said property being injured, was a riot within the meaning of the Riot Damages Act, 1886, s. 1. In *Jarvis v. Surrey County Council*, Weekly Notes, January 24, 1925, the facts were as follows: Certain property inside Whitley Camp was injured by Canadian troops, and the plaintiff had received from the Canadian authorities £750 in part satisfaction of damages sustained, and claimed the balance from the police district more than two years after the cause of action arose. The Surrey County Council contended that the claim was statute-barred under section 3 of the Civil Procedure Act, 1833, but Finlay, J., decided in favour of the plaintiff.

A riot is none the less a riot simply because the crime committed amounts to a felony. In *London and Lancashire Insurance Co. v. Bolands, Lim.*, [1924] A. C. 836, four armed men entered the premises of the respondent company, held up the employes with revolvers, and stole large sums of money from the cashier's office in Dublin. There was no disturbance at the time within the neighbourhood. The respondents had effected a policy with the insurance company under which the appellants were to be answerable for burglary, housebreaking, or theft, but not for damage caused by rioters. The Irish King's Bench Division and Court of Appeal decided in favour of the respondents, but the House of Lords held that the occurrence was a

riot and that the insurance company were exempted from liability.

The Riot Act.—Some persons think that before a riot can exist it is necessary to read the Riot Act. This is not so, as the effect of the statute is to constitute the rioters felons if they do not comply with the proclamation (see 21 Howell's State Trials, 493).

The Act (1 Geo. I., st. 2, c. 5) is to the following effect : Where twelve or more persons, being unlawfully and riotously assembled together to the disturbance of the public peace, are commanded by a magistrate, county sheriff or under-sheriff, mayor of a borough or a borough justice where such assembly shall be, by proclamation in the form thereafter set forth to disperse themselves, and such persons shall to the number of twelve or more unlawfully and tumultuously remain together for one hour after the reading of the proclamation, such persons shall be guilty of felony.

The person authorised by the Act to read the proclamation shall go among the rioters, or as near to them as he can safely come, and with a loud voice command silence or cause silence to be commanded during the reading of the proclamation. The form of the proclamation is to be as follows : " Our Sovereign Lord the King chargeth and commandeth all persons being assembled immediately and peaceably to depart to their habitations or lawful business upon the pains contained in the Act, made in the first year of King George, for preventing tumults and riotous assemblies. *God Save the King* " (a).

Section 3 provides that if the twelve or more persons in question do not disperse within the hour, any justice, constable and such other persons as shall be commanded to be assisting unto such justice may seize and apprehend the rioters, and if any be killed or hurt when resisting apprehension the persons so killing are to be indemnified.

(a) *R. v. Child*, 4 C. & P. 442. This case is referred to in the last edition of Archbold, and, from the way the editor deals with it, it may be inferred that the omission of the words " God Save the King " might save the prisoner from capital punishment, but would not exonerate him from penal servitude, perhaps for life (see Archbold's Criminal Pleading, p. 1169).

Section 5. Wilful opposition by force of arms to the reading of the proclamation is to be felony.

Section 8. Offences under the Act are to be prosecuted within twelve months.

Persons who happen to be on the spot are not to be treated as felons, unless evidence be forthcoming of some participation in the riot (*R. v. Atkinson* (1869), 11 Cox, 330).

Military and other force in riots.—The duty of maintaining order and restraining disorder rests with the local authorities, and not with the central government. Sheriffs, mayors of boroughs, and magistrates, are bound to suppress rioting, and they are also charged with the duty of dispersing unlawful assemblies. When the critical moment for the use of force arrives, force must be used, but not till then.

Military force may be resorted to when a riot is likely to be of a serious kind.

The primary duty of preserving order rests with the civil power. An officer should, where practicable, act under the orders of the magistrate, but when from fear of responsibility he abstains from acting because no magistrate is at hand, he does wrong.

Where officer and magistrate are acting in concert the former must take the latter's orders, and must not either fire without orders or refuse to fire when ordered. Still, circumstances may exist under which an officer may refuse to fire when ordered to do so (cf. *Manual of Military Law*, ed. 1907, p. 219).

In the case of *R. v. Pinney* (1866), 4 F. & F. 763, Little-dale, J., made the following remarks: "A person, whether a magistrate or not, who has the duty of suppressing a riot, is placed in a very difficult situation, for if by his acts he causes death he is liable to be indicted for murder, and if he does not act he is liable for an indictment on information for neglect. He is, therefore, bound to hit the precise line of his duty. . . . Whether a man has sought a public situation or not . . . or whether he has been compelled to take the office which he holds, the same rule applies, and if persons were not *compelled* to act according to law there would be an end of society."

In *Keighly v. Bell* (1832), 5 C. & P. 254, Mr. Justice Willes

stated as follows : “ I hope I may never have to determine how far the orders of a superior officer justify force. If compelled to determine that question, I should hold probably that those orders were an absolute justification in time of riot, at all events as regards enemies and foreigners, and probably also against natural-born subjects, unless the orders were not legally given. I believe the better opinion is that a soldier acting under the orders of his superior officer is justified unless the orders be *manifestly* illegal.”

Soldiers refusing to obey orders of superiors are liable to be tried by court-martial. The whole question of calling in military force is discussed in the report of the Commission on the Featherstone Riots, cited at p. 220 of the Manual of Military Law.

Martial law.—Martial law is a term somewhat loosely employed to denote a number of quite distinct things. Chief among these are :—

- (1) The law formerly administered by the Court of the Constable and Marshal.
- (2) What is properly termed Military Law—the code governing the soldier, in war and peace, at home and abroad.
- (3) The suspension of the ordinary law and the substitution for it of discretionary government by the Executive exercised through the military.
- (4) The common law right and duty to maintain public order by the exercise of any necessary degree of force in time of invasion, rebellion, riot or insurrection.
- (5) The law administered by a British general in occupied enemy territory in time of war, and
- (6) (possibly) The law administered by a British general in an occupied district of ex-enemy territory.

Of (5) and (6) it is unnecessary here to say more than that the law so administered amounts to arbitrary government by the military, tempered by international custom (*e.g.*, The Hague Conventions) and such disciplinary control as the British War Office or home Government think fit to exercise.

(1), (2), (3) and (4) call for further remark.

(1). *The Constable and Marshal.*

Reeves says little is known of this court till the time of Richard II., when, he alleges, it is alluded to as a court which decided cases of contract concerning deeds of arms. He says that in the second year of Richard II. the Commons petitioned that the Constable and Marshal should surcease from holding pleas of treason or felony, which matters should be determined before the King's justices. In consequence of the continued remonstrance of Parliament 8 Rich. II. c. 5 was passed, which provided that divers common law pleas should not be brought before the Constable and Marshal, but that the law should stand as it was in the reign of Edward III. The offices of Constable and Marshal were then hereditary and the heirs being infants their duties were discharged by the King. Another Act was passed after the heirs came of age (13 Richard II.) defining the jurisdiction of the court in the following way: "To the Constable belongs cognisance of contracts touching deeds of arms and war out of the realm, and also of things which touch war within the realm which cannot be determined or discussed by the Common Law with other usages to the same matters appertaining which other Constables before that time had duly and reasonably used." Maitland says that from a very early period the offices of Constable and Marshal were hereditary, and that they devolved on Henry IV. on his accession. The Constable and the Marshal were the leaders of the army and, as early as Edward I.'s reign, declined to lead the army to France. Edward IV. by letters patent in 1462 and 1467 conferred on the Court power to try all cases of treason by two commissioners. The tribunal "came to an end" with the accession of the Tudors, but in the reign of Mary there were trials by martial law, and Elizabeth and James I. granted commissions for trial of persons by martial law which were then not resisted (Maitland, p. 217).

(2). *Military law* is a code embodied in the Army Act, 1881 (b), the King's Regulations and Army Orders. It is a code to which soldiers alone are subject, and it constitutes a number of acts "military offences." These are mainly offences against discipline

(b) The Army Act is re-enacted yearly by the Army Annual Act.

and offences committed by one soldier against another, but include also certain acts which are civil crimes (c). In respect of military offences a soldier is subject to the jurisdiction of the courts-martial, and in the case of minor military offences, to the summary jurisdiction of his company commander and commanding officer. It is important to note that the code does not divest the soldier of his rights or relieve him of his duties as an ordinary citizen. It merely imposes on him, in addition to those duties, a number of obligations and burdens peculiar to his class. A civilian striking an officer may expose himself to nothing more than an action for a common assault, but similar action by a soldier may call down upon him, under military law, penalties of extreme severity. A civilian refusing to pay a debt of honour incurs only social penalties; an officer guilty of such a refusal may be convicted by court-martial of "conduct unbecoming an officer and a gentleman." Again, many offences can from their nature be committed only by a soldier, *e.g.*, desertion, or being drunk on sentry duty. Courts-martial must proceed in dealing with matters within their cognisance on the same principles of evidence and procedure as civil courts.

The cases on military law are numerous and calculated to puzzle the reader, especially those cases where subordinates have taken proceedings against their commanding officers, but those points have been recently cleared up owing to the elaborate judgment of McCardie, J., in *Heddon v. Evans* (1919), 35 T. L. R. 642; Mr. O'Sullivan on Military Law and the Supremacy of the Civil Courts. Space will not permit of a lengthy discussion of the subject, but the views of the judge will appear from the following extract: "A military tribunal or officer will be liable to an action for damages if, when acting in excess of or without jurisdiction, they or he do or direct that to be done to another military man, whether officer or private, which amounts to assault, false imprisonment or other actionable wrong, even though the injury inflicted purport to be done in the course of actual military discipline. Secondly, that if the act causing the injury to person or liberty be within jurisdiction and in the course

(c) There are, however, certain grave crimes in respect of which soldiers can only be tried by the ordinary Courts—*e.g.*, treason, murder, and rape.

of military discipline, no action will lie upon the ground only that the act has been done maliciously and without reasonable and probable cause."

For the last-mentioned of the above conclusions the learned judge cited *Dawkins v. Paulet*, L. R. 5 Q. B. 94; *Dawkins v. Rokeby* (1866), L. R. 8 Q. B. 255; Thomas, 128; *Marks v. Frogley*, [1898] 1 Q. B. 888; *Fraser v. Hamilton* (1917), 33 T. L. R. 431; and *Fraser v. Balfour* (1918), 87 L. J. K. B. 1116.

From the words of the judgment it appears that McCardie, J., did not consider himself free to hold that military wrongs arising from a malicious exercise of authority are cognisable in a court of law and that he was bound by that rule as was also the Court of Appeal.

He appears to agree with Lord Finlay, who said, in *Fraser v. Balfour*, that "the question is still open at all events in this House [the Lords] and it involves constitutional questions of the utmost gravity."

During the recent disturbances in Ireland after the passing of the Irish Free State Constitution Act, 1922, many persons were sentenced to death by courts-martial, amongst others Erskine Childers. He applied for a writ of *habeas corpus*, which was refused, on the ground that a state of war existed in Ireland at the time, and that the civil Courts were unable to discharge their duties (*R. v. Portobello Barracks Commanding Officer, Ex parte Erskine Childers* (1923), 67 S. J. 128). For the important case of *Clifford v. O'Sullivan*, [1921] 2 A. C. 570, the reader is referred to the excellent account of it given by Dr. Bellot in the fifth edition of Thomas's Constitutional Cases (p. 126). The offence charged was being in possession of firearms.

Three points should be noted in regard to military law:— (i) that it governs only soldiers (in which term are included Regulars, Territorials when embodied or in training, and Royal Marines when on shore); (ii) that the only acts of soldiers in respect of which they are amenable to military law are those which are constituted military offences by the Army Act; (iii) that military law does not confer on the soldier any privileged position *vis-à-vis* of civilians, or relieve him of any duties to which they are subject. It merely imposes on the soldier

burdens from which civilians are exempt. By this means the existence of a standing army is reconciled with the preservation of civil liberty. This, while a blessing to the public, is very embarrassing to the soldier when, as not infrequently happens, his duties as a soldier and as an ordinary citizen come into apparent conflict. As a soldier he must obey all lawful orders : as a civilian he must commit no crime or tort. If, therefore, he is ordered to commit some act which would in normal circumstances amount to a crime or a tort (*e.g.*, to fire on a mob) he must often at a moment's notice decide whether the special circumstances of the case make the order a lawful one—a duty calling for considerable tact, judgment and knowledge of jurisprudence; while, if in the course of this intricate calculation he makes a mistake, he exposes himself either to the risk of being court-martialled for disobeying a lawful order or of being indicted for obeying an unlawful one. In practice *bonâ fide* miscalculations are excused by the tribunal, whether civil or military, and obedience to an order not manifestly unlawful is treated as an answer to proceedings in the civil courts. It is a little difficult to gather from the decisions whether a soldier who has reasonably obeyed an order which was in fact unlawful is relieved of legal liability in respect of such obedience, or is excused by an act of clemency though technically liable (see *Keighly v. Bell* (1832), 5 C. & P. 254).

(3). This is martial law in the strict sense of the term. It is equivalent to what is known in some Continental countries as a "state of siege" or "the suspension of the constitutional guarantees," and amounts in effect to the temporary supersession of ordinary law by unlimited government at the will of the executive. Once it has been validly proclaimed, civilians can be tried by courts-martial, the most extensive interferences with the subject's normal rights of liberty and property can be practised with impunity by the government and its servants, and the victims of such interferences can obtain no redress in the ordinary courts of law, either at the time or later. Martial law in this sense is, in fact, no law at all. High authorities, notably Prof. Dicey, assert that it is unknown to our Constitution. Other eminent lawyers draw a sharp distinction between

martial law in time of peace and in time of war, and assert that while the Petition of Right makes it illegal in the first case, it may still validly be proclaimed in the second.

In Great Britain, at any rate, the Crown cannot proclaim martial law by prerogative in time of peace. Nor has the Crown purported to proclaim it in time of war since the time of Charles I. Outside Great Britain martial law has been proclaimed in a few cases, but in these cases powers have, as a rule, been obtained from Parliament (*e.g.*, in Ireland, 1899, and in Jamaica, 1865).

Some authorities hold, nevertheless, that martial law may validly be called into operation in time of war both in Great Britain and outside it, and that when this has been done, the civil courts have no authority to call in question the actions of the military authorities. They rely on the preambles to certain Irish Acts of Parliament (*e.g.*, 39 Geo. III. c. 11, which refers to "the wise and salutary exercise of his Majesty's undoubted prerogative in executing martial law"). They also pray in aid language used by Lord Halsbury in *Ex parte D. F. Marais*, [1902] A. C. 109, "The framers of the Petition of Right well knew what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure." One answer to this line of reasoning was anticipated by Lord Blackburn when he said, in his charge in *R. v. Eyre* (1868), Finlason, 974, "It would be an exceedingly wrong presumption to say that the Petition of Right, in not condemning martial law in time of war, sanctioned it." Another is afforded by the circumstance that when martial law has been proclaimed, the Crown has almost invariably protected its servants after the event by Acts of Indemnity. It is, at least, difficult to see why Acts of Indemnity should be needed if the actions which they retrospectively legalise were by virtue of martial law legal all the time and could not be reviewed or questioned by the civil courts (*d*).

It is sometimes difficult to determine when a state of war

(*d*) See on this part of the subject *R. v. Nelson and Brand* (1867), F. Cockburn's Reports, pp. 59, 79; and Forsyth, Cases and Opinions on Constitutional Law, pp. 198, 199, 553, 556, 557.

exists in a particular district. It was formerly supposed that in answering this question the test to be applied was whether the civil courts were open. It is now, however, established by the decision of the Privy Council in *Elphinstone v. Bedreechund* (1880), 2 St. Tr. (N. S.) 379, and in *Ex parte D. F. Marais*, [1902] A. C. 109, that this test is not conclusive and that the existence of a state of war in a given district is compatible with the continued functioning for some purposes of the civil courts within that district. Shortly after the outbreak of the Great War the whole of the United Kingdom was placed under martial law by the Defence of the Realm Act, 1914, and British subjects and aliens alike remained under martial law for some months. By a second Defence of the Realm Act, British subjects could claim a civil trial on taking the steps prescribed by the Act, but aliens were not affected by the enactment. This emergency legislation is not now in operation.

(4). *The common right to maintain public order by the exercise of any degree of necessary force.*

Every citizen both may, and in the last resort must, preserve the king's peace by the exercise of any degree of necessary force in time of riot, insurrection or invasion.

The degree of force thus properly applicable may extend to the destruction of life and property to any extent. Nor must it be supposed that because this duty devolves in practice mostly on the servants of the Crown—magistrates, soldiers and police—it is not binding also on the ordinary citizen. All must, if necessary, co-operate in re-establishing public order. Martial law in this sense does not need to be proclaimed. The moment public order is disturbed all citizens are entitled to suppress the disturbance (e). In doing so they must apply neither more nor less force than a reasonable man would judge necessary to restore peace. If they adopt excessive or cruel measures they will be criminally answerable in the ordinary courts (*Wright v. Fitzgerald* (1789), 27 St. Tr. 65), and they are bound when the actual conflict is at an end to hand over prisoners to the civil

(e) In *R. v. Brown* it was held that it was an indictable misdemeanour to refuse to aid a police officer in suppressing a riot (*R. v. Brown* (1841), C. & Mar. 314).

powers (Forsyth : Opinion of Edward James and FitzJames Stephen, p. 554; and cf. *Wolfe Tone's Case* (1798), 27 St. Tr. 624-5. If the right amount of force is applied, and in the course of its application acts are committed which in normal times would amount to assaults or trespasses, the courts will regard the acts as justified and required by a state of public disorder, and will give no relief to their victims. Not merely so, but they will, as the case of *R. v. Pinney*, 5 C. & P. 254, shows, punish severely a magistrate who hesitates, in the course of a riot, to commit acts illegal in ordinary circumstances but necessary to the restoration of order. Martial law in this sense differs from martial law in sense (3) in the following important respects :—

(A) The amount of force of which it justifies the exercise is strictly limited to the necessities of the case.

(B) In respect of acts which purport to be justified by virtue of it, an aggrieved party can have recourse to the ordinary courts and will in a proper case obtain redress.

(C) It need not be “proclaimed.”

We have already noticed the current superstition that such acts may not be done until “the Riot Act has been read.” It may be, and often is, the duty of a magistrate to order troops to fire on a riotous crowd without previously reading the proclamation set out in the Riot Act. The effect of reading this proclamation is not to legalise an exercise of force which previous to such reading would be illegal, but simply to constitute any twelve rioters who remain assembled one hour after the reading a “felonious assembly.”

On this part of the subject the student is referred to the statements of the Commissioners for enquiring into the disturbances at Featherstone in 1893 (C. 7234).

The Emergency Powers Act, 1920, is dealt with in Appendix D.

CHAPTER VIII.

TREASON, SEDITION AND OTHER OFFENCES AGAINST THE STATE.

Treason (*proditio*) denotes a betraying, treachery or breach of faith against the Sovereign (Stephen's Commentaries, vol. 4, p. 146).

The earliest statute on the subject is 25 Edw. III., st. 5, c. 2, which constitutes the following offences treason :—

1. Compassing or imagining the death of the king, queen, or their eldest son.
2. Violating the king's companion or the king's eldest daughter unmarried or king's eldest son's wife.
3. Levying war against the king in his realm.
4. Adhering to king's enemies in his realm by giving them aid or comfort in realm or elsewhere.
5. Counterfeiting the king's seal or money, or importing false money.
6. Slaying chancellor, treasurer, king's justices of the one bench or the other, justices in eyre (on circuit), justices of assize, and other justices assigned to hear and determine in their places doing their offices.

Compassing death of Sovereign.—The word “compass” imports design which must be manifested by an overt act. The following are overt acts according to Blackstone, viz. : providing weapons, conspiring to imprison king though not intending his death, assembling and consulting to kill king. Idle words are not now treason, though they were formerly deemed so, but they are high misdemeanours.

In arbitrary reigns people were punished for unpublished treasonable writings, *e.g.*, Peacham (afterwards pardoned) for an unpublished and undelivered sermon, and Algernon Sydney for treasonable unpublished papers found in his closet. Blackstone considers both Peacham and Sydney guiltless of treason, on the

ground that even if mere writing down were a sufficient overt act, such writing was in those cases clearly not relative to any previously framed design of murdering the King, but merely to speculative opinions of the authors.

Levying of war.—This includes not only levying of war to dethrone king, but levying war to reform religion, remove councillors, or redress grievances, as private persons cannot forcibly interfere in grave matters. . . . Resistance of the royal forces by defending a castle against them is levying war, and so is an insurrection with an avowed design to pull down all chapels and the like.

During Anne's reign *Damaree* and *Purchas* were convicted of treason for burning meeting-houses, the court being of opinion that the design was a general one against the State, and therefore a levying of war (1710), 15 St. Tr. 521.

Blackstone says that merely conspiring to levy war is not a treasonable levying of war, but that it constitutes compassing the king's death where it is pointed at the royal person or government.

Adhering to the king's enemies.—Pirates and robbers who invade our coasts are king's enemies, and so also are foreign enemies and our fellow-subjects in rebellion at home. Where, according to Blackstone, a rebel flees the realm, he is not an enemy within 25 Edw. III. (Hawkins, bk. I., ch. 17, s. 28).

Persons acting under duress as regards life or person cannot be convicted as traitors, provided that they leave the king's enemies at the first opportunity (Stephen, Commentaries, vol. 2, p. 146).

The facts of modern civilisation and the overshadowing power of present-day central governments make it extremely difficult for any individual to hope to approach a project of rebellion, or of "levying war against the king in his realm," with much prospect of success. Furthermore, attacks on the person of the monarch or other royal personages are extremely rare in England, a fact which has often been ascribed to the great freedom of English institutions. Be that as it may, we hear but little of charges of high treason of this nature (or indeed any other), and when *R. v. Lynch* came before the Courts, there had

not previously been a charge of high treason tried for sixty-two years. That case is important on the construction of that section of the statute of 1351 which deals with adhering "to the king's enemies in his realm by giving them aid or comfort in the realm or elsewhere." At the outset of the trial it was moved to quash the indictment on the ground that each count charged an adhering "without the realm," and therein disclosed no offence under 25 Edw. III., stat. 5, c. 2. The Court, while leaving the accused the right to move in arrest of judgment should he choose to do so, were of the opinion that the words in question were governed by *R. v. Vaughan*, 13 St. Tr. 525, and that the words "be adhering to the king's enemies in his realm" did not mean that the "accused person *being in the realm* has been adherent to the king's enemies *wherever they were*," to the exclusion of such a case as that before the Court. It is clear that so narrow a construction not only would enable an Englishman to engage with a foreign hostile power against his own country so long as he took care to remain abroad, but also ignores the words "or elsewhere" in the same sentence of the section. The case also decided that section 6 of the Naturalization Act, 1870 (c. 14), does not enable a British subject to become naturalized in an enemy State in time of war and, further, that the very act of purporting to become naturalized under those circumstances constitutes an overt act of treason (*R. v. Lynch* (1908), L. R. 1 K. B. 444).

In *R. v. Casement*, [1916] 2 K. B. 858, it was decided that a man may adhere to the king's enemies and be found guilty of treason whether the act complained of was committed within or without the realm. In the case of *R. v. Ahlers* (C. C. A., [1915] 1 K. B. 616) the facts were as follows. The accused was German Consul at Sunderland and it was therefore part of his ordinary duty to give to compatriots assistance, monetary and otherwise. Ahlers on August 5, 1914, on the day after the outbreak of war, took steps to assist German subjects of military age to return home to fight in the German army. On August 5 an Order in Council was made under the Aliens Restriction Act, 1914, which limited the time of departure for alien enemies to August 11; of this accused knew nothing,

but, as he afterwards stated in his evidence, he believed he was acting in accordance with international law. The accused was indicted for treason and convicted of adhering to the King's enemies, but the conviction was quashed by the Court of Criminal Appeal on the ground that proof was wanting that in acting as he did he was not simply carrying out his duties and also that he was aware that he was assisting the King's enemies.

Slaying the chancellor, &c.—As the chancellor and judges represent the King in court, Blackstone considers them entitled to equal protection. However, attempted murder of the chancellor and judges in court is, according to the same authority, not treason, though murdering the lord keeper (in court) was. These technical treasons the criminal code commissioners consider should be turned into murder (*a*).

By 1 Anne, st. 2, c. 21, s. 3, endeavouring to deprive or hinder any person next in succession to the throne under the Act of Settlement from succeeding thereto, and maliciously and directly attempting same by any overt act, is treason (Stephen, vol. 4, p. 143).

By 6 Anne, c. 41, maliciously and directly by writing or print maintaining and affirming that any other person hath any right to the Crown other than in accordance with the Act of Settlement, or that Parliament has not power to make laws to bind the Crown and the descent thereof, is treason (*id.*, p. 149).

The compassing, or imagining or intending, either within the realm or without, of the King's death, destruction, or bodily harm tending to death or destruction; maiming or wounding, imprisonment or restraint of the King's person, his heirs and successors; and uttering or declaring any such treasonable intent by any overt act, is treason (36 Geo. III. c. 7, and 57 Geo. III. c. 6).

The punishment for treason is now death by hanging (Felony Act, 1870), or beheading (by 54 Geo. III., c. 146, s. 2), but formerly the traitor was hanged, drawn and quartered, after being dragged on a hurdle to the place of execution.

(a) For what was treason in medieval times the student is referred to Stephen's Commentaries, vol. 4, p. 143.

Treason cannot be committed against a King *de jure* who is not King also *de facto*.

According to Hale, a king who has abdicated is no longer protected by the law of treason.

Procedure in treason.—By an Act of Edward VI. two witnesses are necessary to a conviction for treason, but where there is more than one overt act the two witnesses may prove one overt act apiece.

The offence must be prosecuted within three years after its commission, save in the case of compassing the King's death (7 & 8 Will. III. c. 3).

Misprision of treason.—Misprision of treason is bare concealment thereof, as where there is an assent the offence is treason.

Treason-felony.—By 11 & 12 Vict. c. 12, if any person shall, within or without the realm, compass, imagine, invent, devise, or intend to depose the Queen, her heirs or successors, from the throne of the United Kingdom, or any of her Majesty's dominions, or to levy war against the Queen, her heirs or successors, within any part of the United Kingdom, in order to compel by force a change of counsels or measures, and in order to put any constraint upon either House of Parliament, or move any foreigner to invade the realm, or other part of her Majesty's dominions, and shall express such compassing, &c., by publishing any print or writing, or any overt act, such person shall be guilty of felony.

The maximum punishment is penal servitude for life, and if a person is indicted for treason-felony, and the offence turns out to be treason, such person may be convicted of treason-felony.

Every person accused of treason is entitled to be defended by counsel, and also to give evidence on his own behalf, just like any other person accused of crime can now do.

By an Act of the year 1870, no forfeiture of property is now entailed by a conviction for treason.

By 7 & 8 Will. III. c. 3, persons accused of treason can challenge thirty-five jurors; and by 7 Anne, c. 21, a panel of jurors can be demanded ten days before trial, a list of witnesses ten days before.

A copy of the indictment must also be furnished ten days before trial.

Inciting the King's soldiers to mutiny.—By 37 Geo. III. c. 70, s. 1, persons maliciously endeavouring to seduce the King's soldiers or sailors from their duty and allegiance, or to commit an act of mutiny or traitorous practice, are to be guilty of felony, and may receive a maximum punishment of penal servitude for life.

Sedition.—Sedition is the attempt to bring into hatred and contempt the person of the reigning monarch, or the government and Constitution of the United Kingdom as by law established, or either House of Parliament, or to incite his Majesty's subjects to attempt the alteration of any matter in Church or State (Criminal Libel Act, 1819, c. 8), or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst his Majesty's subjects, or to promote feelings of ill-will and hostility between different classes (Strode's Legal Dictionary, *sub tit.* "Sedition").

In the case of *R. v. Burns and others* (1886), 16 Cox, 355, tried at the Central Criminal Court, Mr. Justice Cave stated that "sedition embraces everything, whether by word, deed or writing, which is calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the government and law of the empire."

A meeting lawfully convened may become an unlawful meeting if, during its course, seditious words are spoken of such a nature as to produce a breach of the peace, and those who do anything to assist the speaker in producing upon the audience the natural effect of their words, as well as those who spoke the words, are guilty of sedition (*R. v. Burns, supra*).

Criminal slander.—It is a misdemeanour to slander any member of either of the two legislative chambers, when the defamatory words in question are published and would be libellous supposing they were written concerning a private individual touching his calling in life (Odgers on Libel, p. 493).

Ribald and insulting verbal abuse of either of the legislative

chambers as a body or of Parliament generally, are also criminal misdemeanours.

One may criticise either House, or Parliament generally, and great latitude is permitted; but insulting language calculated to inspire contempt is criminal. The same remarks apply to published verbal abuse of High Court judges (*id.*, p. 498).

Official secrets.—An old Official Secrets Act has been repealed and is now replaced by the Official Secrets Act, 1911, which provides for the prosecution of persons who for any purpose prejudicial to the State approach a place thereby defined to be a prohibited place, or who make sketches of such prohibited place, or take copies of any prohibited document or who communicate any sketch, documents or information, &c., or who receive such sketch, &c. Such persons are by virtue of the statute guilty of a felony.

Persons again are guilty of a misdemeanour under the Act who carelessly part with any sketch, documents or information, &c., to any unauthorised person, or who retain sketches, plans or documents or information too long after the time has arrived for handing them over. Attempts to commit the above offences are to count as the commission of such offences. Persons are to be guilty of a misdemeanour, again, who either harbour spies or wilfully refuse to give information to a police superintendent respecting spies where they have harboured spies.

A prohibited place includes any arsenal, munition works, camp, fort, workshop or any place where munitions, &c., are made. By the Official Secrets Amendment Act, 1920, the following offences have been made punishable :—

- (1) Wearing an unauthorised uniform for the purpose of gaining admission to a prohibited place.
- (2) Making false declarations, oral or written, with the same object.
- (3) Forging passports, passes or permits.
- (4) Pretending to be a government official or in the employ of one.
- (5) Communicating with foreign agents, *i.e.*, persons authorised by foreign powers, with a view to doing acts prejudicial to the State.

- (6) Interfering with the police or the military with such purpose. The Act empowers the Government to intercept telegrams. Receivers of letters are to be registered and they are required to give information on demand as to their customers, and it appears to be an offence to give receivers of letters false information.

No member of the public is to refuse to give information respecting a suspect spy if asked to do so by certain specified police officials.

CHAPTER IX.

ALLEGIANCE—NATURALIZATION—EXTRADITION—FOREIGN
JURISDICTION OF CROWN—FUGITIVE OFFENDERS.

What allegiance is.—Allegiance has been defined as the “natural and legal obedience which every subject owes to his Prince” (*Termes de la Ley*) in exchange for the protection extended by the Prince to the subject (Blackstone, I., p. 369). In addition, however, to subjects who owe permanent or natural allegiance, there are those who owe local allegiance, namely, aliens resident in the dominions of the Prince so long as they reside there. Allegiance is correlative with treason, in the sense that treason can only be committed against the Sovereign by a person owing allegiance to him, either natural or local. Allegiance is, moreover, due to the *de facto* Sovereign (*Calvin’s Case* (1608), St. Tr. 559; Thomas, 50), even though he be an usurper.

(The case of Calvin was formerly of great constitutional importance. James I. was anxious to emphasise the fact that allegiance was a personal tie binding the subject to the Sovereign, and that English and Scotch subjects should be mutually naturalized. This idea was begotten of the idea of divine right. The Commons opposed James in the matter, and two collusive actions were therefore brought. Land was bought in the name of John Calvin, an infant. Calvin was a *post natus* (i.e., born after the accession of James I. in 1603) and claimed as such *post natus*. In the first action the land was claimed for Calvin as a natural-born subject of the King, and in the second action the title deeds were claimed in Chancery. The defendant claimed that Calvin was an alien. This plea was demurred to, and in the hearing of the demurrer the court held that it was bad. Thus the case terminated in Calvin’s favour.)

And when the Crowns of two countries which have formerly been united are severed, allegiance automatically reverts to the

place of birth. Thus, when William IV. died, Hanoverians ceased to be British subjects (*Stepney Election Petition*, 17 Q. B. D. 54).

British subjects and aliens.—All persons are either :—

(1) British subjects ; or

(2) Aliens.

(1) British subjects are either :

(A) Natural born ; or

(B) Naturalized ; or

(C) Have acquired British nationality owing to a British conquest or cession of territory to Great Britain or, if a woman, by marrying a British subject.

The last clause includes denizens.

(2) Aliens are either :

(A) Friendly aliens ; or

(B) Enemy aliens.

Both of these classes, so far and so long as resident in the British dominions, owe local allegiance.

1. *British subjects.*

(A) *Natural born.*—By the British Nationality and Status of Aliens Act, 1914 (c. 19) (which codifies and to some extent modifies the pre-existing law), s. 1, the following persons are deemed to be natural-born British subjects :—

(i.) Any person born within his Majesty's dominions and allegiance.

(ii.) Any person born out of his Majesty's dominions whose father was a British subject at the time of that person's birth, and either was born within his Majesty's allegiance or was a person to whom a certificate of naturalization had been granted (a).

(iii.) Any person born on a British ship, whether in foreign territorial waters or not.

But nothing in this section affects the status of any person born before the Act comes into operation. Such persons are subject to

(a) Or, by the Act of 1918 (c. 38), had become a British subject by reason of any annexation of territory, or was at the time of that person's birth in the service of the Crown.

the pre-existing law, which is not substantially very different. One difference which may be noted is that before the Act of 1914, not only the children of a male British subject born abroad, but his grandchildren so born were British subjects (see 7 Anne c. 5, 4 Geo. II. c. 2, and 13 Geo. III. c. 21, which Acts perhaps applied only to Protestants).

By the law of nations the children of ambassadors born abroad retain the nationality of their father.

(b) *Naturalized British subjects*.—At common law no alien could by any voluntary act become a British subject, nor could any British subject become an alien (*Nemo potest exuere patriam*) (see *Fitch v. Weber*, 6 Hare). Up to 1844 private Acts of Parliament were from time to time passed naturalizing individual aliens. Since that time the joint effect of a number of statutes (b)

(b) The most important of these Acts was the Naturalization Act, 1870, which, though repealed by the Naturalization Act, 1914, still affects the status of many persons born previous to the later statute coming into force, and to which such statute does not apply. Under this Act aliens were permitted to hold land in the United Kingdom but not outside its limits. Descent could be traced in future through an alien, but no alien was to own a British ship or any share therein, or to exercise the Parliamentary or municipal franchise, or hold any office either municipal or Parliamentary, or be a member of either House. British subjects were to be allowed to forfeit their nationality by becoming naturalized in a foreign State or, when applicable, making a declaration of alienage. On obtaining a certificate of naturalization and taking the oath of allegiance to His Majesty a person could obtain local naturalization in a British Dominion, such certificate giving him all the privileges of a British subject there. In *R. v. Francis, Ex parte Markwald*, [1918] 1 K. B. 617, the applicant, born in Germany, migrated to Australia, where he obtained naturalization under an Australian Naturalization Act of 1903. During the war he was resident in England and was interned for non-compliance with an order as to registration of aliens. It was held that neither the certificate of naturalization nor the taking of the oath of allegiance created a sufficient tie to make him a British subject as regarded the United Kingdom (see also *Markwald v. Att.-Gen.*, [1920] 1 Ch. 348). Under the Act of 1870 an alien, by procuring a certificate of naturalization, obtained all the advantages of British nationality provided that the oath of allegiance was taken. No person was to be naturalized unless he had resided for five years in the United Kingdom or had been in the service of the Crown for the like period. All persons born within British territory were to be British subjects natural-born of His Majesty. The infant children of a naturalized parent living with him or her became British subjects, but on attaining twenty-one they could renounce British nationality by making a declaration of alienage.

No person during war can be naturalized in a foreign State or make a declaration of alienage (*R. v. Lynch*, [1903] 1 K. B. 444; *Ex parte Frey-*

is to enable any alien complying with certain conditions to apply for, and in suitable cases to obtain, a certificate of naturalization. A person obtaining such a certificate enjoys, so long as it is in force, to all intents and purposes the full political and civil status of a natural-born British subject (4 & 5 Geo. V., c. 17, s. 3 (i)). The application must be made to a Secretary of State, who before granting a certificate must be satisfied (i) that the applicant has resided in his Majesty's dominions or has been in the service of the British Crown for not less than five years; (ii) that he is of good character, and has an adequate knowledge of English; and (iii) that he intends, if his application is granted, to reside in his Majesty's dominions or to enter or continue in the service of the Crown.

The five years' residence in condition (i) must be five years within the last eight years preceding the application. The last year's residence before the application must be in the United Kingdom. The other four may be in the United Kingdom or elsewhere within his Majesty's dominions.

As the law stood before 1914 a British colony could, in certain cases, naturalize an alien so as to make him a British subject within that colony. The Act of 1914 has, in this respect, made an important innovation. Section 8 (i) of the Act provides in effect that the Government of India and of any self-governing dominion may grant certificates in the same way and with the same effect as a Secretary of State, *i.e.*, can confer full imperial naturalization. A similar grant by the Government of any of the other British possessions must be confirmed by the Secretary of State.

No certificate takes effect until the applicant has taken the oath of allegiance (section 2 (4)).

The Secretary of State may at his discretion grant a certificate to any person with respect to whose nationality as a British subject doubt exists.

An alien applying for a certificate may ask that any infant child

berger, [1917] 2 K. B. 129; *Gschwind v. Huntington*, [1918] 2 K. B. 420). The old common-law rule of a woman changing her nationality by inter-marriage with a foreigner was expressly recognised, with a proviso that she could resume British nationality on becoming a widow. The Secretary of State was also empowered to give a certificate of naturalization in a doubtful case.

of his may be included in the certificate, and if the request is granted such child is naturalized as from the same date as the parent, subject to the child's right on attaining majority to revert to its parent's earlier nationality by a "declaration of alienage."

A wife's nationality follows that of her husband. Hence the wife of a natural-born or naturalized British subject is herself a British subject. She may, however, if he ceases to be a British subject, herself remain one by making a declaration. And the Act of 1918 provides that the British-born wife of an enemy alien may on making a declaration of her desire to resume British nationality be naturalized (c).

The Act of 1914 repeals section 3 of the Act of Settlement, whereby naturalized aliens are disqualified from holding certain offices.

The British Nationality and Status of Aliens Act, 1918, has restricted the grant and facilitated the revocation of certificates of naturalization: (1) *As to grant*, section 3 provides that no certificate shall for a period of ten years after the war be granted to any subject of a country which at the time of the passing of the Act was at war with his Majesty. Exceptions are, however, made in favour of such persons if they have served in his Majesty's or the Allied forces during the war, or were at birth British subjects, or are members of a community or race known to be opposed to the enemy governments. (2) *As to revocation*. Before the Act of 1914 a certificate of naturalization was irrevocable. That Act enables certificates to be revoked if obtained by fraud or false representations. The 1918 Act, however, provides that certificates may be revoked on a number of additional grounds, *e.g.*, when the Secretary of State is satisfied

(c) In the case of *Fasbender v. Att.-Gen.*, [1922] 2 Ch. 850, where a natural-born Englishwoman married in Germany a German between the date of the Armistice and the coming into force of the Treaty of Versailles, the Court took the view that her property could be charged as enemy property under the Treaty. The above rule also applies where a British subject becomes naturalized in a foreign State during a war (*Re Chamberlain's Settlement*, [1921] 2 Ch. 533. The question to be decided was whether Chamberlain was a German national within the meaning of the Treaty of Versailles, and the Court held that he was). From the cases above given it may be inferred that where a British subject becomes naturalized in a foreign State during war he reaps all the disadvantages of the nationality which he assumes while retaining all those of the nationality which he discards.

that the holder of the certificate has shown himself disloyal to his Majesty, or has traded with the enemy during any war, or has been sentenced to not less than twelve months' imprisonment within five years of the grant of the certificate, or was not of good character at the date of the grant—but in the last three cases the Secretary of State must further be satisfied that the continuance of the certificate is not for the public good (section 1, 1918 Act).

The Act also provides (section 3 (i)) that certificates granted during the war to any person who at, or before, the grant was the subject of an enemy power shall be reviewed by a committee and withdrawn if the committee so recommend.

Denizens.—The status of denizens is not affected by the foregoing Acts. By letters of denization the Crown can confer on a foreigner the majority of the rights of citizenship. A denizen can hold land and vote at a parliamentary election (*Solomon's Case* (1869), 2 Peck. 117), but he cannot sit in Parliament or be a privy councillor, or hold any office of trust under the Crown (see Chitty, p. 15). Letters of denization are hardly ever now granted.

Loss of British Nationality.—A British subject could not at common law, but may now, become naturalized in a foreign country, and any person so doing ceases to be a British subject. Naturalization, however, in a country with which his Majesty is at war not only amounts to an overt act of treason but is probably for civil purposes a mere nullity (*R. v. Lynch, ante*, p. 89).

A person can also in some cases renounce British nationality by declaration of alienage; *e.g.*—

- (1) An infant child of a foreign father, naturalized at the same time as its father and at his request, may do so on attaining majority (*d*).

(*d*) By section 12 of the Naturalization Act, 1914, the infant children born abroad of a person who ceases to be a British subject lose British nationality where by the law of the country of their father's adoption they become the subjects of such country; but where the child is born in England and the father afterwards loses British nationality the child remains a British subject.

- (2) A person who, though born out of his Majesty's dominions, is deemed to be a natural-born British subject can make a declaration of alienage (apparently at any time after majority) (e).
- (3) Where a convention to that effect exists between his Majesty and a foreign State, persons of foreign parentage from that State who have become naturalized British subjects can renounce British nationality by declaration of alienage.

As to history and status of aliens, see p. 39 *et seq.*, *ante*.

By the Naturalization Act, 1918, the citizens of a State conquered by England become British subjects, and by the Naturalization Act, 1922, any person born abroad whose birth has been registered at a British consulate within twelve months after such birth, or under special circumstances, by leave of the Secretary of State, within two years after such birth, or any person born after January 1, 1915, who would have been a British subject if born before that date and whose birth is registered before August 1, 1923, is a British subject.

Where during marriage the husband loses British nationality it is competent to the wife to retain her status by making the declaration prescribed by the Act. By the laws of certain States certain persons born therein possess no nationality—*e.g.*, the bastard children of an alien woman born in Germany—and again a person has no nationality where he is denaturalized in his country of origin and fails to obtain naturalization in his country of choice. It is open to argument, therefore, that where a British woman marries a man of no nationality she herself becomes stateless. In *Ex parte Weber*, [1916] A. C. 421, Phillimore, L.J., expressed the opinion that no person could, as regards English law, possess no nationality, but in *Stoeck v. The Public Trustee*, [1921] 2 Ch. 67, Russell, J., held to the effect that statelessness was a legal possibility.

(e) In *Carleback's Case*, [1915] 3 K. B. 716, it was decided that the children of a naturalized British subject born outside British territory were aliens according to the tenets of international law. Where a State is conquered by England during a war the citizens of that State do not lose their nationality until the war is over, and this is probably because the issue is doubtful; but it is questionable whether this rule holds good in English law. In the case of *Gout v. Cimitian*, [1922] A. C. 105, where a native of Turkey was "ordinarily resident" in Cyprus at the time of the annexation, the Court held that he was a British subject for this reason, though the war continued for a long time after the annexation. The Court held that Cimitian became a British subject by virtue of the Order in Council annexing Cyprus to the British Empire.

Extradition.—Certain Acts, called the Extradition Acts, which are now four in number, provide that when the Crown makes a treaty by virtue of these Acts with a foreign State, it (the Crown) may, subject to certain restrictions and formalities, hand over to any given foreign State any persons (whether foreigners or British subjects) who have been found guilty of any offence covered by the Extradition Acts or any of them. The foreign State in return undertakes to surrender to Great Britain persons who have committed extraditable crimes in British territory.

The English law will not allow a man's surrender for a political offence (Extradition Act, 1870, s. 3) (f), and further provision is made that, subject to certain reservations in the Act specified, no person is to be surrendered or tried for any crime other than the crime in respect of which his extradition was demanded. The Act of 1870 further enables the Crown to make Orders in Council directing that the Extradition Acts shall apply to any given State. This Order in Council, furthermore, shall be deemed conclusive evidence that the arrangement therein referred to complies with the provisions of the Act, and that the Act applies in the case of the foreign State mentioned in the Order, and the validity of the Order is not to be questioned.

The Act of 1870 provides for the question of surrender being tried by a Bow Street magistrate, who is styled in the Act a "police magistrate."

When extradition is desired, accused can be arrested—

- (1) By police magistrate's warrant issued on the order of the Secretary of State.
- (2) By warrant of a justice of the peace issued upon information on oath in the ordinary way.

It is the duty of a justice who issues a warrant under the Act of 1870 to send the prisoner before a police magistrate.

When a police magistrate commits a prisoner for surrender, such surrender cannot take place for fifteen days, or such further time as a *habeas corpus* application (if applied for) may occupy (Extradition Act, 1870, s. 11).

(f) In *Re Castioni*, [1891] 1 Q. B. 149, a native of Canton Ticino, in Switzerland, during an insurrection committed murder, and escaped to England; and he was not surrendered, because the offence was a political one.

Section 12 provides that if a fugitive criminal is not conveyed out of the kingdom within two months after committal for surrender by the police magistrate, or if a writ of *habeas corpus* is issued after the decision thereon, any superior court judge may upon the prisoner's application, and upon proof that the Secretary of State has had reasonable notice of such application, order the discharge of the prisoner from custody.

If the fugitive is not discharged, he is surrendered under the warrant of the Secretary of State.

Foreign jurisdiction.—The foreign jurisdiction of the Crown is not easy to deal with in an elementary treatise. It rests primarily on the fact that when a British subject goes abroad he still remains a British subject, though he may owe temporary allegiance in the country where he is residing.

In the first place, if a British subject commits certain crimes (*g*) in foreign territory, *e.g.*, murder or manslaughter, he may be tried and punished for them on his return to England, though, in many cases also, he may be tried and punished in the country where he committed the crime.

In the second place, special provision has to be made for the protection of the persons and property of British subjects abroad. As regards civilised countries, this is provided for by the appointment of consuls, whose duty it is to help British subjects who are charged with crime abroad or would otherwise get into difficulties. Of course, if the foreign country persists in doing wrong to a British subject, the only remedy is by way of diplomatic representation. Diplomatic agents and consuls have notarial powers, and under certain restrictions have the power to celebrate marriage between British subjects.

Thirdly, in the case of barbarous countries, or countries where

(*g*) *Trial for Offences Committed Abroad.*—Persons owing allegiance both natural and local may be tried in English Courts for (*inter alia*) the following offences: (1) treason; (2) murder; (3) manslaughter; (4) bigamy; (5) offences against the slave-trading and kindred Acts; (6) offences by British subjects on the high seas; (7) piracy; (8) offences against the Foreign Marriages Acts; (9) offences against the Official Secrets Acts; (10) offences against the Foreign Enlistment Act; (11) offences against the Maritime Conventions Act; (12) misdemeanours committed in the Colonies and abroad by governors and certain other officials triable in the King's Bench Division.

there is no regular government, foreign jurisdiction is exercised on a much more extensive scale, and its exercise is regulated by the Foreign Jurisdiction Act, 1890, which begins by reciting that by treaty, capitulation, grant, usage, sufferance and other lawful means, the Crown has jurisdiction within divers foreign countries. The Act then proceeds to empower persons authorised by warrant from the Crown to send for trial, at some specified British court, persons charged with offences in the particular foreign country named. It also authorises the Crown, by Order in Council, to create courts of civil and criminal jurisdiction in the foreign country and to regulate the procedure of these courts, and to define the persons who should be subject to their jurisdiction. For example, consular courts of civil and criminal jurisdiction have been created in Persia by an Order in Council of 1889. So, too, consular courts have been created in Morocco, with a curious concurrent and appellate jurisdiction in the Supreme Court at Gibraltar.

Fourthly, reference must be made to the Foreign Enlistment Act, 1870, which regulates the conduct of British subjects during the existence of hostilities between foreign States with which his Majesty is at peace. That Act punishes British subjects who accept commissions or engagements in the military or naval service of any foreign State which is at war with any other foreign State with which we are at peace.

The Act further punishes the building of ships for any foreign country which is at war with any friendly State, and penalises any persons who, in British dominions, prepare or fit out any naval or military expeditions to proceed against the dominions of any friendly State.

(As to foreign jurisdiction generally, see Hall's Foreign Jurisdiction of the Crown.)

Fugitive Offenders Act.—As to the surrender of offenders as between the United Kingdom and its colonies, see the Fugitive Offenders Act (44 & 45 Vict. c. 69).

PART III.**The Crown.****CHAPTER X.****TITLE TO THE CROWN.**

Under the Saxons the title to the Crown was by election, but generally, where he was fit to govern, the eldest son of the deceased King was elected if of full age. Under our common law the title to the Crown may be said to have been hereditary, the nearest male feudal heir being chosen. But (1) where the Throne devolved upon a female the eldest female and her issue was preferred. The first Queen Regnant was Mary, who came to the Throne under Henry's VIII.'s will, sanctioned by an Act of Parliament, and, to allay all possible doubts as to her powers, she being a married woman, a statute (1 Mary I., c. 1) was passed conferring upon her as Queen Regnant all the powers of a King; and (2) the ancient legal rule relative to the exclusion of the half-blood never applied to the title to the Crown (cf. Halsbury, vol. 6, p. 320).

The first four Norman Kings were elected, and Henry II., a grandson of Henry I. in the female line, succeeded owing to a compromise after the civil war in that reign. Richard I. was the eldest surviving son of Henry II. John was the youngest son of Henry II., and is supposed to have murdered Arthur of Brittany—the son of Geoffrey, his elder brother—in order that he might lay claim to the Dukedom of Normandy, then annexed to the English Crown. Hereditary descent was in John's time not strictly recognised, but the idea was growing owing to the close association of the Crown with the land, the Norman kingship, unlike the Saxon, being territorial rather than personal.

This may have been the reason for the murder of his nephew attributed by historians to John.

It is a significant fact that Henry III., John's infant son, was chosen as his successor, though at the time of his accession he was only nine years of age. Edward I. was the son of Henry III. and, though abroad in Palestine at his father's death, he was proclaimed King *jure hæreditario*.

Edward II. was the eldest and only son of Edward I., and Edward III. was Edward II.'s eldest son. Richard II. was the grandson of Edward III., being the son of Edward the Black Prince, the eldest son of Edward III.

Richard II. was deposed and was succeeded by Henry IV., the son of John of Gaunt and grandson of Edward III., who succeeded to the Throne under an Act of Parliament entailing the Crown on him and the issue of his body. Henry V. and Henry VI. succeeded under the same parliamentary entail. Edward IV. succeeded by conquest and by pedigree, which was afterwards fortified by statute, and Richard III., Edward IV.'s brother, is credited with usurping the Throne after murdering—a fact which is open to doubt—the two sons of Edward IV.

Richard III. based his right of succession on the fact that an alleged precontract of marriage of Edward IV. rendered his issue by Elizabeth Gray bastards.

Henry VII. had no claim to the Crown whatever save as a descendant of Edward III., but he was the recognised head of the Lancastrian party and the winner of the Battle of Bosworth.

There was, moreover, no legitimate heir of the House of Lancaster, but Henry nevertheless procured from Parliament a statutory entail on himself and the issue of his body.

Henry VIII. was succeeded under a parliamentary entail by Edward VI., his son by Jane Seymour.

Edward VI. died in infancy and was succeeded by his half-sister Mary, and, after her death, by his half-sister Elizabeth, both of them succeeding under a statute of Henry VIII., subject nevertheless to restrictions and conditions made by Henry VIII.'s will. Mary and Elizabeth both died without issue. Henry VIII., acting under a statutory power, had devised the Crown, on failure of issue of his three children, to the heirs of the body of

his younger sister Mary, Duchess of Suffolk, ignoring the prior claim of his elder sister Margaret.

James I., having got the ear of Elizabeth's Council, was proclaimed King, though Henry VIII.'s will was indisputable. James I., however, sought a parliamentary title, and got it. Charles I. was the eldest surviving son of James I., and Charles II. and James II., as sons of Charles I., succeeded as lawful heirs. The Declaration of Rights declared that James II. had abdicated and that the Throne had thereby become vacant. The Crown was settled by Parliament on William III. and Mary during their joint lives and on the survivor of them during his or her life, remainder to the Princess Anne of Denmark and her issue, remainder to the issue of William III. In 1700 William III., having no issue, and Anne seeming likely to have no surviving issue, the Act of Settlement was passed settling the Throne on the Electress Sophia and the heirs of her body being Protestants.

The Electress Sophia was a daughter of Elizabeth who married the Elector Palatine of Hanover, and a granddaughter of James I. Sophia's son, George I., succeeded Anne under the Act of Settlement.

From the time of George I. to the present the succession has never failed, the legal heir under the Act of Settlement succeeding. Under the Act of Settlement any successor to the Crown who is a Papist, or who marries a Papist, is incapacitated. The successors to the Crown must also take the Coronation Oath and sign the declaration prescribed by the Bill of Rights. The successor to the Throne is to be in communion with the Church.

The words of the oath as taken before the Accession Declaration Act, 1910, were to the following effect :—

“ Will you solemnly swear to govern the people of this realm according to the Statutes of Parliament agreed on and the respective laws and customs of the same ? ”

“ A. I solemnly promise so to do. ”

“ Will you to the best of your power cause law and justice in mercy to be executed in all your judgments ? ”

“ A. I will. ”

“ Will you to the best of your power maintain God's laws, the

true profession of the Gospel and the Protestant reformed religion established by law? And will you maintain and preserve inviolably the settlement of the Church of England and the doctrine, worship, discipline, and government thereof as by law established in England, and will you preserve unto the Bishops and Clergy of England and to the Church there committed to their charge all such rights and privileges as by law do or shall appertain to them or any of them? ”

The King was also required to make a declaration against transubstantiation either at his first Parliament or at his Coronation (Bodley's Coronation of Edward VII., p. 438).

The form of the declaration, however, which was originally prescribed by the Bill of Rights and Act of Settlement, is now, by virtue of the Accession Declaration Act, 1910, as follows :—

“ I do solemnly and sincerely in the presence of God testify and declare that I am a faithful Protestant and that I will according to the true intent of the enactments which secure the Protestant succession to the Throne of my realm uphold and maintain the said enactments to the best of my powers according to law ” (Accession Declaration Act, 1910 (c. 29)).

CHAPTER XI.

THE ROYAL FAMILY.

The King.—The King is the chief officer of the State. He is an essential part of the legislature. Justice is administered in his name, and the process of his own courts, therefore, cannot be directed against him. The executive government of the country is carried on in his name and on his behalf, but what were formerly the personal prerogatives of the Sovereign have now become so largely the privileges of the executive that they can only be dealt with collectively as prerogatives of the Crown. As to purely personal privileges, see further Chitty's *Prerogatives of the Crown*, pp. 12 and 374; and as to the liability of the King's private estates to rates and taxes, see 25 & 26 Vict. c. 37, ss. 8, 9.

Queen Regnant.—The Queen Regnant has the same powers and status as a King (1 Mary I. c. 1).

Queen Consort.—The life and chastity of the Queen Consort are protected by the Statute of Treasons. The Queen Consort, though married, was always a *feme sole*, and could sue and be sued at common law without her husband being joined. She always could purchase property for herself, convey property, and grant leases, and the reason for this is that the King's time is so much taken up that he ought not to be troubled with his wife's business matters. Mr. Robertson says it is uncertain whether the Queen is bound by the Statute of Limitations. The Queen has her own Attorney and Solicitor-General; she pays no toll, neither can she be amerced in any court (Stephen, vol. 2, p. 459; Robertson's *Suits by and against Crown*, pp. 5, 6, 7). She is the King's subject, and is thus amenable to criminal process. She was formerly entitled to certain reservations out of the royal demesne lands, and to a perquisite called "Queen's gold."

It rests with the King whether he will have her crowned or not (*Queen Caroline's Case*, 1 St. Tr. (N. S.) 949).

On the King's death the Queen Consort becomes the Queen Dowager, and the statute relating to treason no longer applies to her.

Prince Consort.—There are four instances of Queens Regnant having been married. Philip and William III., who married respectively Mary I. and Mary II. These two enjoyed the title of King. Prince George of Denmark and the late Prince Albert were Prince Consorts. Prince Albert at State functions had a precedence next to the Queen allotted to him. He was accorded the title of Prince Consort by Letters Patent. He was made a British subject on taking the oath of allegiance and the oath of supremacy (Anson, vol. 1, p. 256; Stephen, vol. 2, p. 461; Todd, vol. 1, p. 195). He was allowed to attend Privy Council meetings, though he was never a Privy Councillor; but cf. Todd, vol. 1, p. 195).

The Prince of Wales.—The life of the King's eldest son is protected by the law of treason (Statute of Treasons).

When the King's eldest son is born he immediately becomes Duke of Cornwall if his father (or mother) is on the Throne. When he succeeds to the Throne, the Duchy of Cornwall immediately vests in his eldest son.

If the King chooses, and when he chooses, he can make his eldest son Prince of Wales and Earl of Chester by Letters Patent. The present Prince of Wales was made Prince of Wales by Letters Patent and a ceremony in addition.

The reigning Sovereign can control the custody and education of the children of his heir, and, according to the better opinion, the custody of all princes and princesses of the blood royal save the issue of princesses who have married into foreign royal families (see May's Constitutional History, vol. 1, p. 264). The chastity and life of the Princess of Wales during marriage are safeguarded by the Statute of Treasons (25 Edw. III. st. 5, c. 2).

Princes and princesses of the blood.—These royal persons take precedence of all peers and public officials. 31 Hen. VIII. c. 10

provides that nobody save the King's descendants shall presume to sit at the side of the Cloth of State in Parliament. This privilege, according to Stephen, extends to the King's brothers, nephews and uncles (Stephen's Commentaries, vol. 2, p. 463). Princes of the blood, till summoned by the House of Lords, are commoners.

By the Royal Marriage Act (12 Geo. III. c. 11), no descendant of the body of George II. (other than the issue of princesses married into foreign families) can lawfully marry without the royal consent signified under the Great Seal and declared in council, and all other marriages are void. All persons solemnizing such marriages, or who are privy and consenting thereto, are to incur the penalties of a praemunire. A descendant of George II. over twenty-five years of age may marry without the Sovereign's consent on giving twelve months' notice to the Privy Council, provided that no objection be taken by Parliament in the interim (cf. May's Constitutional History, vol. 1, p. 265).

CHAPTER XII.

THE ROYAL PREROGATIVE.

There have been numerous definitions of the word "prerogative." Blackstone says it means that pre-eminence which the King hath above all manner of men and out of the course of the common law in right of his royal dignity. It signifies, he continues, in its etymology from *prae* and *rogo*, something which is required, or demanded, in preference to all others. "It can only be applied to those rights and capacities which the King enjoys alone" (Blackstone, vol. 3; Chitty, p. 4).

Comyns' definition is as follows: "The King's prerogative comprises" all the liberties, privileges, powers and royalties allowed by the law to the Crown of England (Digest, vol. 7, p. 42).

Finch says "it is that law in the case of the King which is no law in the case of the subject" (p. 85).

The following definitions are also noteworthy:

"It extends to all powers, pre-eminencies and privileges which the law giveth to the Crown" (Co. Litt. 1, 90b).

"The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of arbitrary authority which at any given time is legally left in the hands of the Crown" (Dicey, p. 420). This would seem to be the most satisfactory definition (a).

"That advantage which the Crown has over the subject where their interests come into competition by reason of its greater strength" (Hallam).

Bracton (b), speaking of pre-eminence, says: *Rex est vicarius*

(a) Professor Dicey is here alluding to the official powers, as the personal privileges of the King are nowadays of less importance than formerly.

(b) Henry Bracton or Bratton was a priest and judge *temp.* Henry III. His famous Commentaries disclose his adherence to the dogmas of Azo of Bologna. According to Maine, a very considerable portion of his treatise savours of

et minister Dei in terrâ, omnis quidem sub eo est, et ipse sub nullo, nisi tantum sub Deo. The realm of the King is an empire, and no emperor is greater than the King.

The present position of the King as a person.—In theory and by strict law the King has very extensive powers. The conventions have, however, altered his position. After the Revolution the King was put on an allowance by the nation, out of which he had to maintain certain offices, while the control of the Army passed to Parliament. Before the Revolution the King and Council conducted the government, though the King was not bound, as now, to take the advice of his Ministers. Parliament could not prevent, as now, threatened mischief, but could only impeach the offender after the event.

After William and Mary's accession the prerogative, as altered by the Bill of Rights, outwardly remained *in statu quo*, but care was taken to avoid its abuse.

The result of the Revolution was to establish gradually three main principles upon which our system of government now rests : (1) The Sovereign is irresponsible, but (2) Ministers are responsible to Parliament for the exercise of every prerogative, and (3) it is the right and duty of Parliament to enquire into the way in which Ministers exercise the prerogative and approve or condemn the mode of exercise.

Recognition of these principles implies three duties binding on the three parties to the constitutional arrangement, viz. :—

“It is the King's duty to select Ministers enjoying parliamentary confidence (*i.e.*, a majority in the Commons) and to retain them so long as that confidence is continued” (Trail, pp. 5 *et seq.*).

It is the Ministers' duty to court parliamentary supervision over their public conduct, to submit all the acts of their policy, with no further concealment than the national interests may

Roman doctrine, but Maitland, though he agrees with Maine to a certain extent, considers that for the most part his work is confined to decisions in the King's Courts. Clerical judges were in those days compelled to resort to Roman law, which Tindall, C.J., styles the collected wisdom of ages, for guidance. (A full account of this writer will be found in Holdsworth, History of English law, 1st ed., vol. 2, p. 184.)

sometimes demand, to Parliament's judgment, and to accept Parliament's adverse opinion upon any important act of administration as an implied summons to resign (*ibid.*, p. 6).

These principles, which embrace the notion of Party Government, gradually began to assume shape after the Revolution.

By Party Government is meant the wielding of the prerogative by the leading party in the Commons, which is now under Cabinet control. We first hear of Party Government in the days of William III., who yielded to it at times, but kept foreign affairs under his control.

The idea gained more definite shape in Walpole's day, as Walpole retired on a hostile vote, and so did North later; but these were the only two cases of such resignations prior to the Reform Act of 1832.

Walpole was not the first Prime Minister, though he resembled one. He was invited by the King to join the Cabinet as the King's friend; he was not asked to form a Ministry or choose his colleagues. By sheer force of character he gained a leadership over his colleagues.

Pulteney, on being asked by George II. to form a Cabinet, only requested the filling up of three or four posts. The better opinion is that there was no Party Government in the modern sense till Pitt the younger came into power in 1782.

At the present day there are no longer two leading parties in the Commons, but there are groups embracing different views, and the man who commands the support of most groups has the best claim to be Premier.

The personal influence of the King declined in the reigns of George I. and George II. Neither of them could speak English well; they ceased to attend Cabinet meetings; and since then English Sovereigns have not found it expedient to attend them. The member of the Privy Council who sat in the chair when the King ceased to attend was the forerunner of the present Premier.

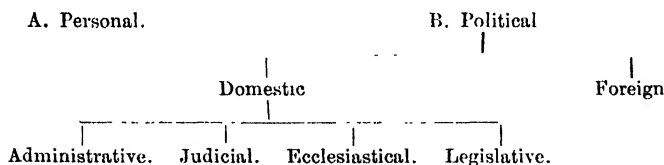
Classification of the prerogatives.—Blackstone divides the prerogatives into three kinds:—(1) Those regarding the royal character; (2) those regarding the royal authority; and (3) those regarding the Royal revenue.

The first two of these were called by the feudal writers the *majora regalia*, and the third was called the *minora regalia*.

Blackstone's classification of the prerogatives is now obsolete, and so is his whole treatment of the subject. To read him one would suppose that the King is the main source of power in the State, an autocrat more absolute than Henry VIII. In practice the powers exercised in his name are exercised by his ministers, and though his views when expressed are treated with respect, he cannot constitutionally, and would not try to, enforce them in the teeth of Cabinet opposition.

Professor Maitland gives the following classification :—(1) Those prerogatives relating to the convening, proroguing, and dissolving Parliament and assenting to statutes; (2) powers relating to foreign affairs, war, peace, treaties, &c.; (3) powers of appointing and dismissing officers civil, military, executive, and judicial; (4) powers relative to the collection and expenditure of the revenue; (5) powers relating to the naval and military forces; (6) powers connected with the administration of justice; (7) powers connected with the maintenance of order; (8) powers connected with social and economic affairs, such as public health, education, trade, &c.; (9) powers connected with religion and the national Church.

It will, however, we think, be more convenient to classify prerogatives as follows :—



In conclusion, we will treat of the *minora regalia* or revenue prerogatives.

I. Personal prerogatives.—The personal prerogatives still exist, and to some extent inevitably overlap with the political. The principal ones are as follows : (1) the King can do no wrong ; (2) the King never dies ; (3) *Rex est vicarius et minister Dei in terrâ, omnis quidem sub eo est et ipse sub nullo, nisi tantum sub Deo* ; (4) lapse of time does not bar the right of the Crown ;

(5) where the title of the King and that of the subject clash, the King's title must be preferred; (6) the King is not bound by statutes unless named therein; (7) the King is never an infant.

(1) *The King can do no wrong*.—Professor Dicey says this means that the King is not liable for any act of his Ministers, but Ministers are liable for all royal acts.

No administrative act can be done by the King without the counter-signature of a responsible Minister. No man can plead the royal order as justification of an illegal act.

The maxim, says Broom, has a double meaning : (a) it means that the King in his personal capacity is not answerable to any earthly tribunal—neither can his blood be corrupted ; for instance, if the King were before his accession attainted of treason, he would by succeeding to the throne be purged of all guilt; (b) that the prerogative of the Crown extends not to any injury, because, being created for the benefit of the people, it cannot be exercised to their prejudice : “ *ergo*, it is a fundamental rule that the King cannot sanction an act forbidden by law : so from that point of view he is not above the law.” The act is invalid if unlawful and the instrument of execution is obnoxious to punishment. As in affairs of State the King's Ministers are responsible for advice tendered to the King, or even for measures which might be known to emanate directly from the King, so may the agents of the Crown be civilly or criminally responsible for acts done by his command (Broom's *Legal Maxims*, p. 40).

Not only can the King not do wrong, but he cannot think wrong.

When, therefore, by misinformation or inadvertence he invades the rights of a subject, as by granting a franchise (*i.e.*, a royal privilege in the hands of a subject) contrary to reason or prejudicial to the community, the law declares that the King has been deceived in his grant, and such grant is void.

Again, the Crown cannot in derogation of the rights of the public fetter the exercise of the prerogative which is vested in it for the public good ; nor can it dispense with anything wherein the subject is interested, or make a grant repugnant to the common law or prejudicial to the interests of an individual (*ibid.*, p. 41).

Even where the royal grant purports to be made *ex certa scientia et mero motu*, the same will be void where it appears that the King was deceived in his grant.

The King cannot by grant of lands create an estate unknown to the law, neither can he grant a peerage descending in a way unknown to the law, as peerage partakes of the nature of land in most respects (*Wilts Case*, p. 276, *post*; *Buckhurst Case*, p. 276, *post*).

A statute, however, though a royal act, is unimpeachable (*Macormick v. Grogan*, L. R. 4 H. L., p. 96).

Where the Crown recalls a grant the grantee from the Crown suffers (*Cumming v. Forrester*, 1 Jac. & W. 342). As regards patents, the Crown is said to be deceived where the invention turns out not to be a novelty, and every part of the patent is void. Up to the time of Edward I. it may be that actions lay against the King. There was a rumour that a writ was issued against Henry III. This is discredited by Pollock. Chitty apparently thinks that the King could be sued up to the reign of Edward I.

As to petition of right, see Chapter XIII.

2. *The King never dies*.—The King has the attribute of immortality. “Henry, Edward, and George may die, but the King survives them all. For immediately upon the decease of the reigning prince his kingship by act of law, without any interregnum or interval, vests in the King’s heir” (Blackstone, vol. 1, p. 249).

“It is true that the King never dies, the demise is immediately followed by the succession. There is no interval; the Sovereign always exists, the person only is changed” (*per* Lord Lyndhurst in *Viscount Canterbury v. Att.-Gen.*, 1 Phil. 321).

As to the effect of the demise of the Crown on Parliament see p. 260. The title of the Sovereign is regulated by succession as well as descent, and therefore if land be given to the King “and his heirs,” the word “heirs” means the successors to the throne.

Hence, if the King dies without issue male, his eldest daughter would take under a grant to the King and his heirs (see *Grant on Corporations*, p. 127). If land is given to the King and his

heirs and a new dynasty succeeds, the first King of the new dynasty will take the land granted (*ibid.*, p. 127).

It is a mistake to think that the theory of the continuance of the royal person is given effect to without qualification. In the case of *Att.-Gen. v. Kohler*, 8 II. L. 634, it was held that a Sovereign could not be held responsible to refund money paid to the Treasury by mistake in the reign of his predecessor.

3. *The King is God's minister on earth.*—Everybody is under him and he is under nobody but God.

The King's realm is an empire and no emperor is greater than the King. The King's blood cannot be corrupted. The King's style and title are as follows : " King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Defender of the Faith, and Emperor of India " (1 Edw. VII., c. 15).

4. *Nullum tempus occurrit regi.*—Lapse of time will not, as a rule, bar the right of the Crown to sue or prosecute, but the exceptions are now numerous. The right of the Crown to claim real property as against the adverse right of the subject is barred after sixty years (The Nullum Tempus Act (9 Geo. III., c. 16)).

Other statutes have also been passed barring the rights of the Crown to death duties after the period named in the statutes has elapsed.

Informations against usurpers of corporate offices must be exhibited within six years after the usurpation (32 Geo. III., c. 88).

Indictments for treason (cases of attempted assassination of the King excepted) must be found within three years after the committal of the crime (8 Will. III., c. 3). There are also numerous cases where criminal proceedings must be taken within a limited period.

Complaints on information before courts of summary jurisdiction must, as a rule, be laid within six months of the commission of the offence.

5. *Quando jux domini regis et subditi concurrunt jux regis præferri debet.*—When the right of the King and the subject conflict, the subject's right must give way to the King's. Thus,

where the King and a subject are joint owners, the King takes the whole.

Where the subject as judgment creditor has seized goods under a writ of *fiery facias*, and after this a writ of extent has been issued affecting the same property, the claim of the Crown under the writ of extent is preferred (Broom's Legal Maxims).

6. *The King is not bound by statute unless expressly named therein.*—It is said, however, that a statute may bind the King by necessary implication as well as express language. The King is also supposed to be bound, though not named therein, by statutes for the public good, for the preservation of public rights, suppression of public wrong, relief and maintenance of the poor, advancement of learning, religion and justice, the prevention of fraud; statutes tending to perform the will of a grantor, donor or founder (*ibid.*).

The presumption, however, is against a statute binding the Crown or Crown property (*per* Alderson, B., in *Att.-Gen. v. Donaldson* (1842), 10 M. & W. 117).

The King's high officials are protected by this maxim. Thus, in *Bainbridge v. Postmaster-General*, [1906] 1 K. B. 178, it was held that the defendant was not liable for wrongful acts of his subordinates in carrying out the business of the Department.

By the Weights and Measures Act, 1878 (c. 49), persons having in their possession for use in trade untrue scales were liable to a fine. Nicholls, a baker and also a postmaster, had untrue scales belonging to the Government and used them for the purposes of his trade as a baker. An information having been laid against him under the Weights and Measures Act, a writ of prohibition was applied for, and the court held that the magistrates had no jurisdiction to hear the case, because the provisions of the Weights and Measures Act did not apply to scales which were Crown property (see *R. v. Kent Justices* (1890), 24 Q. B. D. 181). In *Hornsey Urban District Council v. Hennell*, [1902] 2 K. B. 73, the court held that where land had been acquired and occupied by a Volunteer Corps for military purposes and held under the Volunteer Act, 1863, and the Military Funds Act, 1892, and vested in the commanding officer of the corps for the time being, it is land owned and occupied for the purposes of

the Crown. The commanding officer, therefore, was not liable for expenses incurred by a local body under the Public Health Acts, for repaving the street.

7. *The King is never an infant.*—Royal grants and statutes assented to by an infant King are valid. Maitland says no provision is made by the law for the King being a minor, or from any other reason being incapable of fulfilling the duties of his office. The law holds the King always capable of transacting business. The custom, however, is to provide beforehand for a royal minority by statute.

These statutes are called Regency Acts, giving as they do a Regent limited powers of doing the work of the King, say till the latter is 18 years of age.

II. Political prerogatives.—Domestic.

Administrative prerogatives.—These consist of creation of peers; creation of corporations, a power now scarcely ever exercised; the appointment of Ministers and other government officials; the dismissal of Ministers and government officials; the headship of Army, Navy and Civil Service.

The King's signature is necessary for signing numerous appointments. He also signs numerous Orders in Council. Certain documents bear the Great Seal and the Lord Chancellor is responsible for affixing it.

Numerous documents are under the Royal Sign Manual and in all cases Ministers who countersign are responsible for the royal act.

Judicial prerogatives.—The King is the fountain of justice and general conservator of the peace of the kingdom. By the expression "fountain of justice" the law does not mean the author or originator, but only the distributor, of justice. Justice is not derived from the King as his free gift, but he is the steward of the public to dispense it to whom it is due; *ad hoc creatus est, et electus, ut justitiam faciat universis* (c), (d).

(c) The office of "cynning" was evolved from the office of heretog or war leader of the Teutonic classes mentioned in Tacitus. To stop the bloodfeud the heretog settled disputes when a man was killed, and took his "wite,"

The King is not the spring, but the reservoir, whence right and equity are conducted by a thousand channels to every individual. The original power of judicature (after the period of self-help—the bloodfeud period—had elapsed) was vested in society at large, but as it would be impracticable to render complete justice by the people in their collective capacity, nations have committed that power to selected magistrates, who, in England, were the kings. The King, therefore, has alone the right of erecting courts of justice, and hence it follows that all jurisdictions of courts are mediately or immediately derived from the Crown. Their proceedings run in the King's name (e).

In County Courts and in some other local courts the proceedings do not disclose on their face any connection with the King. In ancient times the Kings dispensed justice in court, but for centuries they have deputed this duty to their judges, to maintain the independence of whom the Act of Settlement provided that their commissions should be made not *durante placito*, but *quam diu se bene gesserint* (Blackstone I., ch. 7).

By 1 Geo. III. c. 23 it was provided that the judges should

the relations taking the "wer," according to the market price (weigild) of the deceased, which depended on his position. In cases of injury, to prevent a duel the heretog awarded a bôt (compensation), unless the offence was bôtless. Bôtless offences were the precursors of what were later known as crimes.

(d) The King formerly sat in Court as a judge, and took part in decisions, though he did not always actively interfere. In the *Dialogus de Scaccario*, that wonderful book written about the time of Henry II. by Fitzneale, Bishop of London, as to the workings of the Exchequer, we find these words: "in quâ [the Curia Regis] ipse [Rex] in propriâ personâ jura decernit." Dr. Bellot does not attribute to Coke the statement in his Reports where he is supposed to have said that no King since the Conquest decided cases personally in Court, and reminds us that there is considerable doubt as to whether Coke wrote the report in which the statement occurs. Henry I. may have decided cases, but this is doubtful (cf. Bigelow, *Placita Normannica*, p. 238). John, according to Langmead, personally decided a case in the Exchequer in the sixth year of his reign. Henry III. frequently sat with his judges in Westminster Hall. Instances are recorded of John, Henry III., Edward I., and Edward II. personally dealing with criminal cases. Edward IV. sat with his judges for three days to see how they did their work (Stow, *Chron.*, p. 416), but the personal interference of the King with his judges was of infrequent occurrence, and Coke told James I. that though he could sit in Court he could not give an opinion.

(e) In criminal proceedings the King nominally prosecutes, and civil proceedings in the Superior Courts are commenced by the King, who summons the defendant.

be continued in their offices during good behaviour, notwithstanding any demise of the Crown (Chitty, p. 83). The King is restricted in his appointment of judges. Judges of the High Court must be barristers of at least ten years' standing. County Court judges must be barristers of seven years' standing; recorders, of five years. As to Lords of Appeal in ordinary see p. 280.

The King cannot determine any cause or proceeding save by the mouth of his judges, whose power, however, is only an emanation of the prerogative (Chitty). Courts of justice have gained a well-known and stated jurisdiction and their decisions must be regulated by certain and established rules of law (f).

It necessarily follows that even our Kings themselves cannot, without Parliamentary sanction, grant any addition of jurisdiction to such courts, nor authorise anyone to hold them in a manner dissimilar to that established by the common law or statute law of the land. His Majesty cannot grant a commission to determine any matter of equity, but it ought to be determined in the Court of Chancery (now High Court of Justice), which has immemorially possessed a jurisdiction in such cases (Chitty, pp. 75 *et seq.*). The King cannot legally authorise any court in the United Kingdom to proceed contrary to English law (ff).

“Most indubitably the power of the King to erect new courts was exercised in the Middle Ages. Nothing was commoner. A distinction was drawn between common law and other courts. The King could not create a Court of Equity. Has the Queen nowadays power to create new courts? I believe we must say that it exists” (Maitland, p. 419). In the *Bishop of Natal's Case* (1864), 3 Moo. (N. S.) 152, the Court held as follows:—“Though the Crown by its prerogative may establish courts to proceed according to common law, yet it cannot create any court to administer any other law. It was also decided that, as no ecclesiastical tribunal or jurisdiction is required in a colony or settlement where there is no established Church, the ecclesiastical

(f) Rules of Courts, superior or inferior, are mostly instances of indirect legislation of Parliament, and have the force of statutes.

(ff) As regards colonial courts it would perhaps be more correct to say that the King cannot create any court contrary to English notions of right and justice, *e.g.*, permitting torture.

law of England cannot be treated as part of the law which settlers carry with them from the Mother Country."

Maitland considers that the prerogative as to the erection of courts is now obsolete, because (1) a court of common law would be so clumsy as to be comparatively useless; (2) the King cannot tax his subjects for the upkeep of courts he chooses to erect (cf. Maitland, p. 420).

Pardon.—Pardon is a part of the judicial prerogative (g).

The policy of pardoning public offenders has been questioned by Beccaria on the ground that clemency should shine forth in the laws and not in the execution of them. By convention the King only pardons on the advice of the Home Secretary. No pardon can be pleaded by way of defence to an impeachment of the Commons (Act of Settlement, 1700 (c. 2), s. 3), but the King may remit penalties resulting from the impeachment. Thus, three lords who were impeached and attainted after the Rebellion of 1715 were subsequently pardoned (Halsbury, vol. 6, p. 404).

Limitations on the prerogative of pardon.—Where the penalty of a *præmunire* has been incurred by the sending of a man in custody out of the kingdom contrary to the Habeas Corpus Act, 1879, the King cannot pardon (Halsbury, vol. 6, p. 404; Chitty, p. 92).

Where an offence affects the public only the King can, as a rule, pardon, but in many cases the maxim applies, *Rex non potest gratiam facere cum injuria et damno aliorum*. Thus the Sovereign is unable to pardon a public nuisance whilst it is still unabated (Bacon's Abridgment, *sub tit.* "Pardon"). Again, the King cannot pardon a libel or a slander, or remit a recognisance to keep the peace (Halsbury, vol. 6, pp. 406 *et seq.*).

When once a common informer had commenced a penal action, the King could not remit the penalty, as this would be calculated to prejudice the common informer. Now, however, by virtue of the Remission of Penalties Act (c. 32) penalties for

(g) Pardon differs from dispensation, as pardon only relates to past transgressions, whilst dispensation concerns transgressions past and also future (cf. Maitland).

offences may be remitted by the Crown, though payable to parties other than the Crown.

By 13 Rich. II., st. 2, c. 1, no pardon for treason, murder, or rape shall be valid unless the offence be particularly specified therein, and particularly in murder it shall be expressed whether it was committed by lying in wait, assault, or malice prepense.

Formerly the pardon of a principal offender enured for the benefit of the accessory, but this is no longer the case. No fee or stamp is chargeable for a pardon. A pardon may be pleaded in bar to an indictment, or after judgment in bar of execution (Archbold, Criminal Pleading).

It must be pleaded at the first opportunity for pleading it, for if the prisoner, who can plead pardon, pleads "not guilty," he is deemed to have waived the pardon and cannot avail himself thereof in arrest of judgment (*R. v. Norris*, 1 Rolle, 297).

By a statute of Henry VIII.'s reign the prerogative of pardon was vested in the Sovereign to the exclusion of the Lords. Pardon is absolute or conditional, and it is frequently conditional on the enduring of another sentence. Again, where a man has undergone the sentence awarded him by the law he is constructively pardoned. The effect of a pardon is to blot out the offence and to reinstate the person pardoned in his former position. This is illustrated by such a case as *Hay v. The Tower Division Justices* (1890), 24 Q. B. D. 561. One Hay was convicted of felony and then pardoned. A statute provided that no convicted man could for ever be licensed to sell spirits. The court held that as Hay had been pardoned he could be licensed and hold a public-house.

Enduring a sentence operates as a pardon. In *Leyman v. Latimer* (1876), 3 Ex. D. 15, the plaintiff, who was editor of a paper called *The Advertiser*, sued the defendant in libel for describing him as "a felon editor." Leyman had been guilty of felony and sentenced to twelve months' hard labour, and had served his sentence. The court held that the defendant had libelled the plaintiff.

Baron Cleasby, however, made the following remark in his judgment, "It is not necessary to decide what would have been

the result if defendant had only said of the plaintiff, 'he is a convicted felon'."

The reason for the decision in *Leyman v. Latimer* was as follows: By 9 Geo. IV. c. 32, s. 3, where any offender shall be convicted of any felony not punishable with death and shall undergo the punishment awarded, such undergoing of punishment shall have the same effects and consequences as a pardon under the Great Seal.

Pardons may now be under the Sign Manual as well as the Great Seal (Halsbury, vol. 6, p. 404, *et seq.*).

The King may pardon a clerical offender, thus absolving him from all consequences of an ecclesiastical offence; and by 55 & 56 Vict. c. 32, s. 1, where a clergyman is convicted of any offence which would render him liable to deprivation or loss of preferment, and such clergyman receives the royal pardon before the institution of another clergyman, the bishop shall, within twenty-one days after receiving notice in writing of such pardon, again institute him and cause him to be inducted into the preferment without any fee (Clergy Discipline Act, 1892 (c. 32), s. 1, sub-s. 2).

The King as arbiter of commerce.—As protector of commerce the King alone possesses the power of creating markets and fairs, nor can anyone claim them but by royal grant or prescription, which presupposes such grant. This prerogative is now unimportant as it has been superseded by statute.

The King as the fountain of honour.—The Crown alone can create and confer dignities and honours. The King is not only the fountain, but the parent of them. For further information see Chitty, p. 6.

Ecclesiastical prerogatives.—See *post*, Chapter XIV.

Legislative prerogative.—The relations between the Crown and Parliament are dealt with at length in Chapter XXV., *infra*.

The King has power at common law to legislate for conquered and ceded colonies until he, without express reservation of his rights, sanctions a Constitution. He has also statutory powers

of legislating by Orders in Council for settled colonies (see p. 179).

Further legislative powers as to certain mandatory colonies have been vested in the Crown under the Covenant of the League of Nations and the statute sanctioning it. As to legislative powers of the King as head of the Church, see p. 154.

Foreign prerogative.—Issue of letters of marque and reprisal.—The laws of nature and nations vest in every power a right to make reprisals and adopt a system of fair retaliation for the aggressions of another community. Where a nation manifests general hostility towards another by unauthorised attacks and satisfaction is denied and explanations are evaded, it is for the King alone to authorise his subjects to retaliate.

Such authority was in old days conferred upon English subjects aggrieved by foreign aggression, by means of “letters of marque and reprisal,” which were commissions to fit out privateers. Letters of marque are now obsolete, since England subscribed to the Declaration of Paris, 1856, whereby privateering was abolished.

Right to make war and peace.—As representative of his people and as executive magistrate the King possesses the exclusive right to make war or peace, either within or out of his dominions, and the Constitution leaves it to the King’s discretion to grant or refuse a capitulation or truce to an enemy.

In the proclamation of war it was not unusual expressly to permit enemy subjects to remain in British dominions if they behaved peaceably.

As incident to the prerogative of declaring war the King has assigned to him the management of the war. *Ergo*, the King, as head of the Army and Navy, can order their movements, regulate their internal arrangements, or diminish or increase their number. The King is also solely entitled to erect forts and other places of strength. Unless Parliament permits it, the keeping up of a standing army in time of peace is forbidden by the Bill of Rights (1 Will. & M., sess. 1, c. 1). The Army is kept up by annual legislation, and the Army Act permits the trial of military offences by court-martial, according to articles framed

by his Majesty. The King has a right to require the personal service of every man able to bear arms in case of a sudden invasion, and the allegiance due from the subject renders it incumbent on him to assist his Sovereign on such occasion.

As regards seamen and seafaring men the King may even in time of peace compel them to enter the Navy by forcibly impressing them.

This prerogative is only exercisable over individuals who have voluntarily chosen a seafaring life, and it does not extend to landsmen or fishermen except in certain cases (see Chitty, pp. 43-47).

Maitland says : " There can be no doubt at all that to press sailors into his service is one of the King's prerogatives. It has never been taken away. I cannot say when last it was used. It is not used in time of peace." Maitland suggests a doubt as to whether the King can use this prerogative in time of peace.

In 1743 Broadfoot was indicted for murdering Calahan, a sailor, on a man-of-war. Broadfoot was being impressed for naval service and he shot Calahan.

The judge directed a verdict of manslaughter and held that " pressing for sea service is legal provided the persons impressed are proper objects of the law and those employed in the service are armed with a proper warrant " (Thomas, p. 114).

As conductor of war the King can also adopt measures to prevent the egress or ingress of his enemies out of or into his Majesty's dominions. Thus, his Majesty may proclaim blockades; may, during war or threatened hostilities and on occasions of emergency, lay an embargo on all shipping, and thereby prevent anyone from leaving the kingdom. The King may, on the other hand, permit an enemy to come into the country by granting to him letters of safe conduct.

But passports granted by the Foreign Secretary are now more usually obtained (Chitty, p. 49). The King can prevent any alien from coming into the country, whether in time of war or peace (*Musgrove v. Chund*, [1891] A. C. 272). The King on an emergency can enter on his subjects' lands to make fortifications; he has also a prerogative right in saltpetre and gunpowder; he may also prohibit the exportation of arms or ammunition or

other articles of that nature useful in war, called contraband of war, out of the kingdom.

What is termed the war prerogative of the King is created by the perils and exigencies of war, is for the public safety, and by its perils and exigencies is limited (Chitty, p. 50).

Ambassadors.—The King possesses the right to receive and send ambassadors from and to foreign countries.

The Sovereign can probably refuse an ambassador who is objectionable to him personally or otherwise.

The right to receive ambassadors is more important than it at first sight appears, as no ambassador (*h*) or any member of his train or any member of his family is liable to civil process, and he is probably not liable to criminal process, though Oliver Cromwell is reported to have sanctioned the execution of an ambassador found guilty of murder. But modern practice is in favour of the complete extritoriality of diplomatic agents (see Hall's International Law, 3rd ed., p. 168).

In Queen Anne's reign the ambassador of Peter the Great was arrested for debt. He gave bail in the action and communicated with the Russian Court, and Peter demanded the instant execution of all parties concerned. This modest request was not complied with, but an Act was passed which provided that all writs and process whereby the person of any ambassador or his domestics may be arrested or his goods distrained or seized shall be void, and the persons prosecuting and their solicitors, and those who execute such process, shall suffer such penalties and corporal punishment as the Lord Chancellor or the Chief Justice or any two of them shall think fit, but no trader within the description of the bankrupt laws, who shall be in the service of any ambassador, is to be protected by the Act, nor shall anyone be punished for arresting an ambassador's servant unless the name of such servant be registered with the Secretary of State (Stephen, vol. 2, bk. 4, c. 6, and 7 Anne, c. 12).

As to the extent of this privilege some doubt exists, and it probably does not include detention for *mala in se* (Stephen, vol. 2, bk. 4, c. 6).

(*h*) Including in this term all superior diplomatic agents—*e.g.*, minister plenipotentiary, &c.

It has been held that where an appearance to an action has been entered by a person diplomatically privileged, such action cannot be set aside, provided that no interference with liberty or personal property has taken place (*Taylor v. Best* (1854), 14 C. B. 487). Since *Taylor v. Best* was decided two cases have come before the Courts which possibly affect, in whole or in part, its validity. In *Re Bolivia Exploration Syndicate*, [1914] 1 Ch. 134, it was held by Astbury, J., that both under the common law and the Diplomatic Privileges Act, 1708, a foreign ambassador cannot be sued in an English Court, and that service of process on him is void. "This privilege can be waived, if at all, only with the full knowledge of the party's rights in the case of the ambassador himself, and also with the consent of his Sovereign; or if the diplomatic official is of inferior grade, with the consent of his superior." Except in cases like *Taylor v. Best*, where the defendant was merely a nominal one, it is doubtful whether waiver is valid. In *Re Suarez*, [1918] 1 Ch. 176, C. A., it was held by Swinfen Eady and Warrington, L.JJ., that an ambassador can, with his Sovereign's consent, waive his privilege.

It is contrary to law to charge ambassadors with customs duty, and they cannot be rated in respect of premises they occupy (*Parkinson v. Potter* (1885), 16 Q. B. D. 152; but see *McCartney v. Garbutt* (1890), 24 Q. B. D. 368).

A servant residing outside the embassy is not within the privilege where the comfort of the ambassador does not depend on such servant (*Novello v. Toogood* (1823), 25 R. R. 507), and a servant whose duties are nil can be proceeded against, e.g., a chaplain who does not perform service (*Seacombe v. Bownley*, 1 Wils. 20).

An English servant is within the privilege (*Novello v. Toogood*, *supra*).

All the officers of the embassy (e.g., attachés) enjoy the same immunities as the ambassador (*Parkinson v. Potter* (1885), 16 Q. B. D. 152) (i).

(i) Besides ambassadors, nations have certain subordinate functionaries resident in ports and important towns of foreign countries. These agents are known as consuls, vice-consuls, &c. In semi-civilised countries where there are no regular judges, British consuls exercise judicial functions, both civil and criminal. Ordinary consuls have certain duties as to the effects of compatriot

Right of the Crown to take the subject's property.—The common law rights of the Crown to take the subject's property were, and in theory at any rate are, extensive.

The Crown in time of war can enter upon and use the lands of the subject to repel invasion, but cannot dispossess the subject, as "since Magna Charta the subject's estate in lands or buildings has been protected against the prerogative of the Crown" (*per* Lord Parmoor in *De Keyser's Case* (*infra*, p. 133) (k).

In the *Saltpetre Case* (1606), 12 Coke's Rep., p. 12, the court held that "when enemies come against the realm to the sea coast, it is lawful to come upon my land adjoining the same coast to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it, and therefore by the common law every man (including, of course, the King and those under him) may come on my land for the defence of the realm . . . and in this case the rule is true, *princeps et res publica ex justâ causâ possunt rem meam auferre*. But after the danger is over, the trenches and bulwarks ought to be removed so that the owner shall not have prejudice to his inheritance." In Dyer (86b) there is the following dictum, "Yet we will agree that in some cases a man may justify the commission of a tort, and that is so, when it sounds for the public good, as in time of war making fortifications on another's land without licence" (l).

St. John, the defender of Hampden in the *Ship Money Case*, made the following admission: "In times of war not only his

testators and intestates who die in the country to which they are accredited. They have also to collect trade statistics and forward particulars of same in proper form to the British Foreign Office. They perform marriages. They act as notaries. They succour friendless and destitute British sailors. They can arbitrate in disputes where their compatriots are concerned. They render assistance in proper cases where their compatriots become involved in difficulties. They must keep registers of births, deaths and marriages. They register transactions as to ships. They administer oaths. They exercise the functions of magistrates as regards attestations under the Army Act. They must get an exequatur from the country to which they are accredited (see *Encyclopædia of Laws of England*, *sub tit.* "Consul").

(k) The land must be required for strictly military, and not administrative, purposes (see *Att.-Gen. v. De Keyser's Royal Hotel, Ltd.*, [1920] App. Cas. 508).

(l) Privileges which the Crown shares with its subjects are not prerogatives, but these authorities are inserted for convenience.

Majesty, but every man that had power in his hands, may take the goods of any within the realm . . and do all other things that conduce to the safety of the kingdom." In the same case, Buller, J., said : " I do agree that in time of war when there is an enemy in the field the King may take goods from the subject, where there is such a danger as tends to the overthrow of the kingdom."

Mr. Dicey, speaking generally of political emergencies, states that, by a constitutional convention, in times of danger it may be the duty of Ministers to break the law, trusting to Parliament for indemnity (Dicey, p. 418), but what Mr. Dicey calls convention Mr. Justice Darling appears to treat as law : "*Salus populi suprema lex* is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it" (*per* Darling, J., in *Shipton, Anderson & Co. v. Harrison Brothers*, [1915] 3 K. B. 684). The unbiased dictum of Mr. Justice Darling appears to tally with the so-called corrupt judgment in *Bate's Case* : "The power of the King is both ordinary and absolute. Ordinary power, which exists for the purpose of civil justice, is unalterable save by consent of Parliament. Absolute power, existing for the nation's safety, varies with the royal wisdom" (*Bate's Case* (1606), 2 St. Tr. 371; Thomas, 17).

In the *Petition of Right Case*, [1915] 3 K. B. 649; Thomas, 63, where land was taken from the suppliant for the purpose of an aerodrome, the Court of Appeal, upholding the judgment of Avory, J., held that naval and military authorities acting under orders from the Crown, both under the prerogative and the Defence of the Realm Consolidation Act, 1914, and regulations made thereunder, might enter into possession of and occupy the lands of the suppliant to defend the realm without paying compensation, and that the prerogative was not limited to a case of actual invasion, rendering immediate occupation necessary.

This decision was in effect overruled by the important case of *Att.-Gen. v. De Keyser's Royal Hotel, Ltd.*, where the facts were as follows : The company at the commencement of the war got into difficulties and Mr. Whinney was appointed receiver and

manager by the debenture-holders. In the spring of 1916 there were negotiations between the War Office and Mr. Whinney for the hotel to be taken over by the Government at a rental, but the parties failed to come to terms; and in the end the Crown took possession of the hotel under the Defence of the Realm Act, 1914. Mr. Whinney protested against the entry of the Government upon the premises. A petition was presented claiming a rent for use and occupation of the hotel, and was, at the hearing, dismissed by Peterson, J., who considered himself bound by the *Petition of Right Case*. On appeal, a majority of the court—Swinfen Eady, M.R., and Warrington, L.J., dissenting—ruled that the respondent was entitled to a fair rent for use and occupation under the Defence Act, 1842.

The case came on for hearing before the House of Lords on May 10th, 1920, when their lordships held that the suppliants were not entitled to a rent for the use of the hotel as there was no consensus on which to found an implied contract; that the regulations under the Defence of the Realm Act, 1914, gave no power generally to take the land, but merely authorised the taking under the Defence Act, 1842; that the Crown could not take under its prerogative: but suppliants could, if they chose, claim compensation under the Defence Act, 1842 ([1920] A. C. p. 508). Their lordships were also of opinion that the Crown could not take the land under the prerogative or by any statute for administrative purposes (*ibid.*). At the hearing a suggestion was made that the alleged prerogative on which the appellant (the Attorney-General) relied had merged in the statute. Perhaps it would be more accurate to say that the prerogative is in these circumstances restricted within the limits defined in the statute. As Lord Atkinson put it, "It was suggested that when a statute was passed empowering the Crown to do a certain thing, which it might theretofore have done by virtue of its prerogative, the prerogative was merged in the statute. I do not think that the word 'merged' was happily chosen. I would prefer to say that when such a statute, expressing the will of the King and the estates of the realm, is passed, it abridges the royal prerogative *while it is in force* to this extent, that the Crown can only do that particular thing under and in accordance with the statutory provisions and

that its prerogative to do that thing is in abeyance" ([1920] A. C. pp. 539—540).

Lord Sumner said : "The Legislature, by appropriate enactment, can deal with such a subject-matter as that now in question in such a way as to abate such portions of the prerogative as apply to it" (at least so long as the statute operates). He goes on to say : "... I think that the Executive did not take possession under the prerogative, for the Defence Acts had superseded it; that the Act of 1914 and Regulation 2 did not in themselves enable possession to be taken; that the taking of possession must be referred to the powers given by the Defence Acts, and that, in consequence, the suppliants are entitled to be compensated in accordance therewith" ([1920] A. C. 561, 562).

Lord Dunedin alluded to the alleged powers of the King as defender of the realm as follows : "The most that could be taken from them" (opinions of judges in the *Saltpetre Case*, etc.) "was that the King, as *suprema potestas* endowed with the right and duty of protecting the realm, was for the purpose of the defence of the realm entitled to take any man's property, and that the texts gave no certain sound whether this right to take was accompanied by an obligation to make compensation to him whose property was taken." He also stated further on that "if the whole ground of something which could be done by the prerogative was covered by a statute it was the statute that ruled."

Their lordships laid stress on what Sir Swinfen Eady said at the hearing in the Appeal Court. What he stated was as follows : "Those powers which the Executive exercises without parliamentary authority are comprised under the comprehensive term of prerogative. Where, however, Parliament has intervened, and has provided by statute for powers previously within the prerogative being exercised in a particular manner, then, subject to the limitations and provisos, they can only be so exercised. Otherwise what use would there be in imposing limitations if the Crown could disregard them at its pleasure."

It is interesting to note incidentally that the following definition of prerogative by Mr. Dicey has been judicially confirmed by Sir Swinfen Eady's dictum cited above : "The residue of discretion-

ary or arbitrary power which at any given time is legally left in the hands of the Crown."

Assuming that a statute appears by implication only to permit the Crown to seize the subject's property, the Courts will lean towards the protection of the subject unless the intent to take the property be sufficiently clear (*Central Control Board v. Cannon Brewery*, [1919] A. C. at p. 752). In *Robinson & Co. v. The King* (1921), 37 T. L. R. 698; Thomas, 66, the Food Controller, acting under a Regulation made by virtue of the Defence of the Realm Act, seized the subject's property, and the remedy provided was the assessment of compensation by a commission set up under the Defence of the Realm Act. For some reason the Commissioners refused a hearing, and the Court held that the establishment of a tribunal to assess compensation did not preclude the suppliant from seeking the protection of the ordinary tribunals if justice was refused by the Commissioners (*m*).

III. Revenue prerogatives and powers: Ancient revenues.—The Norman and early Plantagenet Kings had ordinary and extraordinary revenues, the former consisting of feudal dues, taxes raised from Jews, *bona vacantia*, whales, sturgeons, waifs, strays, perquisites connected with the judicature, and other miscellaneous sources of income. When money was wanted for war and emergencies extraordinary aids were raised.

Ordinary revenue: Feudal dues.—Under the feudal system the King was lord paramount of all the land in the kingdom. He was the supreme feudal lord and not the mere tribal chieftain of early Saxon times.

The King let out the land to followers of his, or, in other words, his tenants in chief, in exchange for money payments, perquisites, and personal services. The tenants also had their feudatories, and so did tenant's tenants, and so on. The King's tenants held by various tenures, some of them free and others unfree. Those who had free tenures were known as free-

(*m*) This is an instance of the Executive under statutory powers usurping the functions of the judiciary.

holders (*n*), and those who had unfree were known as copyholders. These latter rendered unfree and uncertain services to the King or their lords, and in early days they were villeins (*i.e.*, serfs). There were various kinds of free tenures, the most important of which were knight service, grand serjeanty and petty serjeanty (the former of which was a species of knight service), free and common socage, and the clerical tenures of frankalmoign and divine service. Archbishops, bishops, abbots, abbesses, and priors held baronies of the King subject to feudal incidents, but tenants in frankalmoign and divine service held their lands in exchange for prayers and masses.

Knight service.—This was the most honourable tenure, but was subject to burdensome incidents, which were as follows : (a) Aids, which were three in number—(1) Liability to contribute towards the expenses of making the lord's eldest son a knight; (2) a similar contribution towards portioning once the lord's eldest daughter; (3) a contribution towards ransoming the lord from captivity. (Richard I. was ransomed.) (b) Reliefs, or sums payable by a tenant on succeeding to the estate of the ancestor. (c) Fine on alienation, which remotely resembled the *laudemium* paid by the *emphyteuta* to his *dominus*. (d) Primer seisin (a burden peculiar to tenants *in capite*), which was the right of the King to the first year's profits from the "fee" provided the heir was of full age when he succeeded his ancestor. (e) Wardship. This was the right to the custody of the person and the rents and profits of the land of the infant, if a male till twenty-one, and if a female till sixteen, without rendering any account. (f) Marriage, or right of disposing of the hand of infant wards. If a male tenant refused to marry a person of equal rank, he had to forfeit the sum the suitor was willing to pay the lord, and if the ward married without the lord's consent he forfeited twice

(*n*) There were three kinds of freeholds, viz., life estates, fee tails, and fee simples, which were descendible to a man and his heirs lineal and collateral. When a man had a fee simple he could alienate it by subinfeudation, *i.e.*, create a feudal tenancy underneath his own, thus making himself a feudal lord. This practice was stopped by the statute *Quia Emptores* (18 Edw. I. c. 1), which enacted that a man could sell his land or any part thereof provided that the grantee held of the same chief lord as the grantor and by the same services.

his market price (*duplicem valorem maritagii*). If a female refused a suitable match the lord could take the rents and profits till she had attained twenty-one, and after she had attained that age until such time as the value of the marriage had been collected. (g) Suit of court, which was attendance at, or payment of a fine for non-attendance at, the Court Baron. (h) Escheat, or right of the lord to take the estate on failure of tenant's heirs (*per defectum sanguinis*); in the event of the tenant committing treason, or felony, or being outlawed, or abjuring the realm in certain instances (escheat *per delictum tenentis*). If the tenant committed felony he forfeited his estate to the mesne lord subject to the King's year, day, and waste; and if he committed treason the King took the estate and the mesne lord took nothing (o).

Grand serjeanty.—This tenure was subject to the incidents of marriage and wardship, but its main feature was the holding of land subject to rendering the King a special service, *e.g.*, being the King's cup-bearer, such service being valued at £5 a year or upwards; but, according to Littleton, the tenant held of the King by some personal service only (cf. Williams's Real Property, 22nd ed., p. 49).

Petty serjeanty in Littleton's time was a tenure where a man held of the King, yielding him annually some implement of war (*ibid.*, p. 52). According to Williams, it might be a socage tenure. In earlier times the tenant also held his estate in exchange for some trifling service either to the King or a mesne lord (*ibid.*, p. 52).

Socage.—The socager received his estate in exchange for fixed services and afterwards for a fixed annual sum. Like the tenant in knight service, he owed to his lord or the King fealty, aids, reliefs and, occasionally, homage. His lord had rights of escheat, but not of wardship or marriage. By the Statute of Tenures, in the reign of Charles II. knight-service tenure was converted into

(o) To ascertain profits arising from tenure *in capite* an inquest was held by the King's Justices to fix the reliefs and other feudal incidents (if any), and this business was afterwards transacted by a special Court called the Court of Wards and Liveries (Blackstone, III.). The personal services due to the King at his coronation are determined by a Court called the Court of Claims, set up at the beginning of every reign.

free and common socage, thus enabling all tenants to devise the whole of their lands by will.

Socage tenure still exists and contributes in a small degree to the revenue.

“Ordinary revenue” is that revenue which the Crown has had from time immemorial, and “extraordinary revenue” is such as is contributed by subjects out of their private means for Crown purposes (Stephen, vol. 2). (We should perhaps invert the terms, since we have come to think of the latter class of revenue as ordinary.)

The “ordinary revenues” are :—

1. The custody of a bishop's temporalities—i.e., the right of the Crown to take the profits whilst the episcopal see is vacant, but these are held in trust for his successor.
2. The right to annates and tenths. Annates were the first year's profits of a church benefice, formerly paid to the Pope and afterwards to the Crown, and tenths were the tenth part of the annual profits of a Church benefice, which formerly were papal dues also. These profits are now paid to the Governors of Queen Anne's Bounty (see Constitutional Year Book, 1920, p. 81; see also Stephen, vol. 2, p. 532).
3. The profits derived from Crown lands, which are dealt with by the Commissioners of Woods and Forests and the Board of Agriculture.
4. Right to royal fish, wreck, treasure trove, waifs and estrays, royal mines and escheats. *

Whales and sturgeon are royal fish. The Crown cannot claim royal fish unless the same be caught on or near to our coasts. The King is entitled, it is said, to the whale's head and the Queen to its tail (Stephen, vol. 2, c. 7).

Wrecks.—Wrecks, subject to certain restrictions, were Crown property, and no ship was a wreck if there were a human being, or any living creature, on board (see Carter, p. 297).

The whole matter is now regulated by sects. 510—537 of the Merchant Shipping Act, 1894. Owners of wrecked ship, goods and cargo, are now entitled to claim their property as against

the Crown within a year. They have, however, to satisfy salvage claims. Finders of wreck must hand the same to district receivers of wreck. For the purposes of the statute governing the law on the subject, the following things are wreck, namely, *flotsam* (things found floating near shore); *jetsam* (things thrown overboard to save ship and not floating); and *ligan* (things tied to a buoy or like object for preservation). Where goods are unclaimed for a year and a day they pass to the Crown, and, subject to payment thereout of salvage claims, go into the Consolidated Fund (Stephen, vol. 2, p. 646) (p).

Treasure trove.—This consists of money, coin, bullion, plate, silver, or gold discovered either in the earth or some secret place. The concealment must have been made a long time before its discovery (*vetus depositio pecuniæ*). As treasure trove goes entirely to the Crown, it is a misdemeanour to conceal it. What is treasure trove is determined by a coroner and a jury (Stephen, vol. 2, p. 651).

As a matter of grace, the Crown has in certain recent cases paid the finder the value of the treasure trove.

Estrays.—These are beasts of value belonging to unknown owners which are found wandering at large within the precincts of a manor. These beasts belong to the King or his grantee after a year and a day has elapsed, during which period the owner can have them on payment of expenses for keep.

Waifs (*bona waivata*).—These were goods thrown away by a thief in his flight from justice. The property was confiscated by way of punishing the owner for not prosecuting the thief. The goods of foreign merchants were not waifs, as they were not supposed to know English law (Stephen, vol. 2, c. 7).

Royal mines.—This is connected with the prerogative of coining money, as precious metal from mines constitutes the

(p) *De prerogativa regis*. This statute is believed not to be genuine, but from the Statute Book we gather that its supposed date was the seventeenth year of Edward II. It deals with feudal incidents like wardship, marriage, primer seisin, and escheat; the right of the King to present to benefices in the case of a lapse; his right to wreck, whales, and sturgeons; his right of guardianship over *infants*, idiots and lunatics; and other matters.

materials for making money. By the old common law, according to Stephen, the King took possession of mines containing gold and silver, whether they contained base metals or not. People would not sink mines, and it was therefore provided by 1 Will. & M., c. 30; 5 Will. & M., c. 6; and 55 Geo. III., c. 134, that no base metals are to be forfeited, but that the King shall have the mine on payment for the base metals (Stephen, vol. 2, p. 655).

Escheat.—Escheat was formerly of two kinds, and we may also say is now of two kinds, viz. :—

- (1) Per defectum sanguinis.
- (2) Per delictum tenentis.

Escheat per defectum sanguinis exists when a man dies without heirs, and by analogy the Crown now takes personal property of those who die without next of kin in many cases (see Intestate Act, 1884).

Escheat per delictum tenentis formerly ensued whenever a man was convicted or attainted of treason or felony. Forfeiture and corruption of blood has now been abolished in cases of conviction for treason or felony (see Forfeiture Act, 1870), but a right of forfeiture to the Crown or its grantee still applies in theory to all cases of criminal outlawry (*q*) and misprision of treason.

Dues for the custody of the estates of idiots and lunatics.

The Civil List.—The foregoing items, constituting the “ordinary” revenue of the Crown, were collected by prerogative and paid to the Sovereign until the Civil List Acts, the first of which was passed in 1715. Thenceforward, by virtue of similar Acts passed at the beginning of each reign, these

(*q*) There are several statutes on the Statute Book which state that a person for a given offence shall suffer the penalties of a “*præmunire*.” The penalties of a *præmunire* entail loss of land and goods, and imprisonment during the royal pleasure. This prerogative right to claim forfeiture is, to say the least of it, obsolete, and it is questionable whether it now can be said to exist. An outlaw is a person who has escaped from criminal process, and cannot be found at the time final steps in outlawry have been taken against him.

hereditary revenues were paid into the Consolidated Fund. In consideration of assigning them the Royal Family were endowed by the Acts with a regular annual charge upon the Consolidated Fund, called the "Civil List."

Formerly the payment of certain official salaries, *e.g.*, the judges', and also certain pensions were charged on the Civil List; but since the reign of William IV. it only includes the sum allowed to the King and certain members of his family. By the present Civil List Act, in consideration of the assignment above referred to, the King receives £470,000 per annum, to be applied as follows, *viz.*, £110,000 for the privy purses of the King and Queen; salaries and pensions of household officers, £125,000 per annum; household expenses, £193,000 per annum; royal bounty, alms and special services, £13,200; unappropriated, £8,000; and provision is made for Queen Mary, the Prince of Wales and the younger children of the Royal Family.

Extraordinary Revenue.—The total revenue of the country, less the hereditary revenues dealt with above, constitutes, in Blackstone's paradoxical nomenclature, the "extraordinary revenue." No portion of this revenue is raised by prerogative: it is levied wholly by virtue of statutes. Some of these statutes are "temporary," and must be re-enacted each year, *e.g.*, those whereby income tax is raised. Others are "permanent," *e.g.*, those whereby excise is levied.

The great bulk of this revenue, by whichever kind of statute authorised, can be ranged under one or other of the following heads:—1. Customs; 2. Excise; 3. Death Duties; 4. Stamps; 5. Land Tax; 6. Income Tax; 7. Super-tax; 8. Post Office Receipts; 9. Suez Canal Shares.

All these taxes are paid into the Consolidated Fund (*i.e.*, to the credit of the Government's account with the Bank of England) and cannot be paid out without statutory authority.

Customs are duties leviable on exports and imports. The reason for the tax was that the King permitted the subject to leave the realm taking his goods with him, and also because the King wanted compensation for the upkeep of the ports, and because it was necessary to protect the merchants from pirates.

Customs duty is payable on (*inter alia*) the following articles, viz., imported beer, mum, spruce, chicory, cocoa, cocoa husks, chocolate, coffee, currants, raisins, dried fruits, foreign and colonial spirits, sugar, saccharine, molasses, tea, tobacco and snuff.

Excise.—Customs duties affect imports and exports only. Excise duties are levied on certain commodities made or prepared in the United Kingdom. These include beer, spirits, chicory, coffee, &c., divers luxuries, and licences, such as a hawker's licence, dog licence, gun licence, &c.

Death duties.—These consist of probate duty and account duty (abolished as to future duties by the Finance Act, 1894), estate duty, succession duty and legacy duty. (See now Finance Act, 1910, Pt. III.)

Stamp duties.—The following documents (*inter alia*) are liable to stamp duty, viz., bills of exchange, promissory notes, cheques, deeds, contract notes on sale and purchase of stock, insurance documents, numerous agreements, patents for inventions, writs and certain other legal documents, and numerous other documents. (See Stamp Act, 1891, and subsequent amendments.)

Court fees, it may be noted, are mainly collected by means of stamps.

Income tax.—A tax upon incomes was first heard of in the early part of the fifteenth century (Stephen's Commentaries, 16th ed., vol. 2, p. 673), but this fell into desuetude. It next appeared in the shape of a war-tax imposed by the younger Pitt in 1799. This tax was abolished "in 1802, revived in 1803, and again abolished in 1816" (*ibid.*, p. 673). In 1842 the income tax came to stay, and is now an annual imposition recently much augmented by the Great War.

Unearned income is more heavily taxed than earned income, and the tax is graduated according to the domestic burdens of the taxpayer as well as his income. The married man pays less than the unmarried, and the married man with children pays

less than the married man who is childless. Abatements are allowed with respect to each child, stepchild, or adopted child, and also relatives of the taxpayer or his wife whom he has undertaken to support.

Super-tax.—This burden was first imposed in 1909, upon persons whose annual income from all sources exceeded £5,000 in respect of the amount by which their income exceeded £3,000. Now (1925) anyone whose income exceeds £2,000 per annum is liable.

Ministers and the prerogative.—At the present day there is a curious divergence between the law and the practice of the Constitution as regards the prerogative. Prerogative acts are done in the name of the Crown, and the executive government is carried on in the name of the Crown. But the prerogative is no longer the personal prerogative of the King. All public acts are done by the Crown on the advice of the Ministers of the Crown. The privileges arising out of prerogative are therefore the privileges of the executive, and as Ministers are dependent on the House of Commons, that House has now obtained a control none the less powerful because indirect over what was formerly the peculiar province of the Crown. As Mr. Lowell puts it, with slight exaggeration, “by leaving the prerogative substantially untouched by law, and requiring that it should be wielded by Ministers responsible to them, the Commons have drawn into their own control all the powers of the Sovereign that time has not rendered obsolete” (Government of England, p. 13).

CHAPTER XIII.

PROCEEDINGS BY AND AGAINST THE CROWN AND ITS SERVANTS.

It has long been settled law that so far as the United Kingdom is concerned no action lies against the King personally. Perhaps this was not the case in early days, and it was rumoured that there was a writ found in the days of Henry III. or Edward I., where the King was made a defendant, but the genuineness of this writ is doubted by high authorities of the present day. Chitty, however, is doubtful as to whether in the days of Edward I. the King could not be sued. What he says is this : "There can be no doubt that, at all events since the reign of Edward I., the Crown has been free from any action at the suit of its subjects" (Chitty, ch. 13, p. 339).

Chitty mentions a statute, viz., 39 & 40 Geo. III., under which in certain events the property of a deceased King is liable for his debts (*id.*, p. 242).

He also says that the proper remedies to recover land or personal property from the Crown were by : (a) *Monstrans de droit*; (b) *Traverse of office*; (c) *Petition of right*.

Monstrans de droit.—This was a mode of procedure employed when the facts upon which the Crown and the suppliant relied had already been established, whether by commission, inquest of office or otherwise, and the judgment of the court was required as upon a special case. It is now obsolete (Broom's *Legal Maxims*, p. 50).

Traverse of office.—*Traverse of office* has long been obsolete. Chitty says it was at common law a very contracted remedy. It only lay in the case of goods and chattels, or where the office did not give a seisin or possession of land to the King, but merely entitled him to an action (Chitty, p. 356). Dr. Bellot, editor of *Thomas's Leading Cases in Constitutional Law* (5th ed.), adds that where a tenant became a lunatic or died an

inquest was held as to the facts, and the property was taken over by the King, who was said to be entitled under what was called office found. Where there was a chance of contesting the title of the King, the claimant might traverse the facts found at the inquest, and the proceeding was called "traverse of office" (Thomas, p. 80; 34 Edw. III. c. 14).

By 36 Edw. III. c. 14, the claimant against the King could have the case heard in the Chancery, and this was called *monstrans de droit* (see Thomas, 5th ed., p. 80).

Petition of right.—The remedy by petition of right still exists, and, subject as below, it lies (1) to recover lands, goods or moneys which have found their way into the possession of the Crown, where the suppliant demands either restitution or compensation; (2) to recover moneys due under a contract made with the Crown, e.g., for goods supplied; (3) to recover damages for breach of contract by the Crown; (4) to recover moneys payable to the suppliant under a grant of office. The remedies, as will be seen, are not universally applicable, where the suppliant is to blame, he can expect no redress. See *organ v. Seaward* (2 M. & W. 544) Parke, B., said that "the suggestion of the grantee avoids a grant of land from the Crown" (Broom's Legal Maxims, p. 42).

Immunity of the Crown in Tort.—The King is not responsible for tortious acts. In *Tobin v. The Queen*, 33 L. J. C. P. 206, the court held that "the notion of making the Sovereign responsible for a supposed wrong tends to consequences which are clearly inconsistent with the duties of the Sovereign." In *Feather v. The Queen* (1865), 6 Best & Sm. 257, it was held that the grant of letters patent to Feather, the suppliant in the case, did not preclude the Crown from the use of the invention, even without the assent of or compensation made to the patentee. By 5 Edw. VII. c. 29, s. 29, it is provided that a patent shall have to all intents the like effect as against his Majesty as it has against a subject: provided that any government department or its agents or contractors may, at any time, use the invention for the services of the Crown on such terms as may be agreed upon between the patentee and the department or, in default of agree-

ment, as may be settled by the Treasury after hearing all the parties interested.

The maxim *Qui facit per alium facit per se* does not apply where the King's servants are guilty of tortious acts towards individuals.

Liability of Crown Servants in Tort.—If the King commands an act which is unlawful, the courts treat the complaint of the suppliant as if there had been no command at all, so that an action will lie against the King's servant in respect of the unlawful act. Under certain colonial statutes and ordinances, however, the Crown itself can be sued for tort in certain colonies and dependencies (see *Att.-Gen. of Straits Settlements v. Wemyss*, 13 App. Cas. 192; *Farnell v. Bowman*, 12 App. Cas. 643; *Hettihewage Simon Appu's Case*, 9 App. Cas. 571; Broom's Legal Maxims, pp. 46 *et seq.*). But, subject as above, the aggrieved party's remedy is against the servant of the Crown, who is liable personally for all tortious acts committed in the course of his official duties.

Thus, in *Madrazo v. Willes*, 24 R. R. 422; *Thomas*, 132, a naval captain was held responsible for the unlawful destruction of a merchant vessel, though he was acting conscientiously and, as he believed, in accordance with his duty. Again, in *Walker v. Baird*, a naval captain was held liable for the destruction of a lobster factory off the coast of Newfoundland, the court holding the defendant responsible because, without the authority of the Legislature, he had interfered with a subject's private rights, and that he could not justify his conduct by showing that he was acting under the provisions of a treaty made between France and England (*Walker v. Baird*, [1892] A. C. 491).

The case of *Raleigh v. Goschen*, [1898] 1 Ch. 73, illustrates the liability of a servant of the Crown for a tortious act. It was a case of trespass on land by officials of the Admiralty. The court held that the alleged authority of a department of Government did not justify a trespass, but that only those persons who were actually guilty of the act of trespass, or who authorised the same, were liable. The court exonerated Mr. Goschen, the First Lord of the Admiralty, in the absence of proof that the act of trespass was really his act. The court also held that the defendants could be

sued individually, but that they could not be sued as an official body, and that proceedings against them in their official capacity would not lie.

Further cases on the liability of Crown servants for torts are : *Bainbridge v. Postmaster-General*, [1906] 1 K. B. 178; *Thomas*, 78; *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 124; *Macgregor v. Lord-Advocate*, [1921] A. C. 847 (a).

Writs of mandamus directed to Crown servants.—Where the performance of a public duty is neglected a writ of mandamus lies to compel its performance, but in the case of servants of the Crown there are exceptions to the rule, especially where the executive officials are concerned. In theory a writ of mandamus is the proper remedy, but the judge will ask himself whether or not the duty is owing to the individual or owing to the Crown, and where the duty is owing to the latter will refuse the relief asked for (cf. *The Queen v. The Treasury Commissioners*, L. R. 7 Q. B. 387; see also *R. v. Inland Revenue Commissioners*, [1891] 1 Q. B. 488). Statutes of comparatively recent date have established certain departments of Government as corporations and endowed them with a capacity of suing and being sued. Actions in cases may be prosecuted as far as judgment, but execution against the effects of the corporation or the Crown servants in charge of it will be stayed, and the remedy of the plaintiff is payment out of moneys voted by Parliament for the purpose (cf. *Thomas*, pp. 83, 84).

The Crown cannot be a trustee.—This rule has one statutory exception in the case of the Public Trustee, for whose defaults the Treasury is responsible.

The first important case on this point was *Baron de Bode's Case*, 8 Q. B. D. 208. Here the petition stated that under a

(a) As regards the United Kingdom no proceedings lie against the Crown for tort. In *Bainbridge v. Postmaster-General* it was held that the Postmaster-General was not liable for the acts of subordinates. In *Mersey Docks Trustees v. Gibbs* it was held that no action would lie against a Crown servant for the tortious acts of subordinates, even though appointed by such Crown servant. As to when a Crown servant is liable for tort the underlying principle appears to be this, that an action lies against him where he commits a tortious act which is outside the scope of the authority given him by the Crown. Where a Crown servant, again, owes no duty to an individual, neither the Crown nor the servant is liable.

convention made with France the British Government had received moneys for compensating British subjects whose property was confiscated during the wars succeeding the Revolution. Here a statute had been passed providing a mode for distribution of the moneys, and the court held that petitioners' rights depended entirely on the effect of the statute. The question was left open as to whether the Crown was responsible for a breach of trust.

In *Rustomjee v. The Queen*, 1 Q. B. D. 487, the facts were as follows :—The Chinese Emperor, under the Treaty of Nankin, paid to the Crown certain moneys on account of debts due from Chinese to British subjects trading with China. A British creditor brought a petition of right to recover moneys which he alleged to be due to him from a Chinese debtor. Cockburn, C.J., held that the action was “wild” and “untenable.” In *Kinloch v. The Secretary of State for India*, 7 App. Cas. 619, proceedings were brought to compel the defendant to account as trustee for booty granted by the Queen to the Secretary of State for distribution amongst members of certain forces. It was held that the warrant did not transfer the property or create a trust enforceable in equity, and that no action lay against the defendant, who was merely the agent of the Crown for a specific purpose. In *Gidley v. Palmerston*, 3 Brod. & B. 275; Thomas, 73, Lord Palmerston was sued as Secretary of State for War by the executor of a War Office clerk for arrears of retired allowance, which defendant was authorised to pay out of moneys provided by Parliament. The court held that an action would not lie against a public agent for any act done by him in his public character or employment, even though alleged to be, as in this case, a breach of such employment.

Contracts made by civil servants on behalf of the Crown.—The case of *Macbeath v. Haldimand* (1786), 1 T. R. 172; Thomas, 72, illustrates the immunity of a colonial governor in respect of contracts made on behalf of the Crown, but of late years the most important of these cases have been actions brought against civil servants, who have engaged persons to assist them in Government work with the leave of the Crown. In the absence of legislation to the contrary, all Crown servants,

both civil and military, hold office during the royal pleasure. In *Grant v. Secretary of State for India* (1877), 2 C. P. D. 445; Thomas, 78, it was held that the King could dismiss his servants at pleasure, that publication of dismissal in the Gazette was not a libel, and that no official of the Executive could make a contract binding on the Crown in this respect (*per contra* see *Graham v. Public Works Commrs.*, [1901] 2 K. B. 781). Two other important cases on this subject are *Dunn v. The Queen* and *Dunn v. MacDonald*. *Dunn v. The Queen*, [1896] 1 Q. B. 116, was a petition of right, where the suppliant sued the Queen for dismissing him from his post. He alleged that Sir Claud MacDonald had engaged him as consular-agent for three years, and he claimed damages for dismissal before the expiration of that period. The court decided that the suppliant held his appointment during pleasure. Dunn afterwards sued Sir Claud MacDonald, and the court held that where a public servant acting on behalf of the Crown makes a contract with a person he is not responsible for a breach of such contract (*Dunn v. MacDonald*, [1896] 1 Q. B. 401). The case is also an authority for the proposition that a public servant professing to contract on behalf of the Crown cannot be sued for breach of warranty of authority.

In *Gould v. Stuart*, [1896] A. C. 575, it was held that the Crown has by law power to dismiss at pleasure officers, both civil and military, a condition, unless it is otherwise provided by law, to that effect being implied by every contract of service.

In *Hales v. The King* (1918), 34 T. L. R. 589, C. A., Avory, J., held that a Crown servant holds office during the royal pleasure, and that even if a special contract could be proved, the Crown will not be bound by the same.

Cases where the title of Crown to property is indirectly questioned.—Cases of this kind comprise suits between subject and subject in which the rights of the Crown may be indirectly involved, *e.g.*, action concerning an outlaw's property; also cases where the Sovereign is interested as *parens patriæ*, and finally cases where the King acts as protector of the rights of his subjects, *e.g.*, provisions in a will for general charitable purposes. In all these instances the Attorney-General must be made a party to the proceedings (Broom's Legal Maxims, p. 50).

Procedure on a petition of right.—This is regulated by the Petition of Right Act, 1860. The petition is prepared by the suppliant and left with the Home Secretary for the King's perusal, and the King, if he thinks fit, may grant his *fiat* that right be done. This he does on the advice of the Attorney-General. If the Attorney-General advises that a *fiat* be refused, the subject has no redress. In a case where the *fiat* has been obtained a copy of the petition and *fiat* endorsed with the prescribed prayer is lodged at the Treasury. The Crown has then twenty-eight days to plead or demur to the petition. The procedure after this resembles that in an ordinary action, with the exception that the Crown may have discovery against the suppliant, but that the suppliant cannot have it from the Crown, and also that a petition of right, unlike an ordinary pleading, is somewhat difficult to amend (as to this, see *Badman Brothers v. Regem*, [1924] 1 K. B. 64). In the event of the suppliant winning his case, the methods of execution available between subject and subject are not applicable (*ibid.*, pp. 44 *et seq.*) (b).

The right of the Crown to withhold the *fiat* is hardly doubtful, as the Petition of Right Act evidently accords to the King a discretion in the matter. Apart from that statute the right to refuse a *fiat* would be contrary to Magna Charta, which says, *Nulli negabimus justitiam et rectum*. In *Ryves v. The Duke of Wellington*, 9 Beav. 600, Lord Langdale said: "I am far from thinking that it is competent to the King or his advisers to refuse capriciously to allow investigation of any proper question raised on a petition of right." As a matter of practice, it is now customary for the Home Secretary to endorse "Let right be done" as a matter of course, without referring the case to the Attorney-General (*ibid.*, p. 46).

By the Indemnity Act, 1920 (c. 48), it is provided that, subject to certain exceptions therein set out, no legal proceedings shall be instituted against any servant of the Crown in respect of any act done by him during the war in good faith and in the execution of his duty.

(b) As to costs, the rule is that the Crown neither pays nor receives costs, but in *Re Carbonit Aktiengesellschaft*, [1923] 2 Ch. 504, where a patent had been infringed by the Crown, it was held that costs were in the discretion of the Court.

The exceptions include cases (1) in which ships or cargo space have been requisitioned from the subject; (2) in which he has sustained direct loss in consequence of interference with his property or business, provided such requisition or interference has been effected in purported exercise of prerogative rights or powers conferred by defence of the realm legislation. (In both of these cases the claimant is relegated to a new tribunal constituted by the Act, the War Compensation Court); and (3) in which the proposed proceedings are in respect of rights under or alleged breaches of contract. In this last case the subject can proceed in the ordinary courts by petition of right, but he must institute proceedings within one year from the termination of the war or the date when the cause of action arose.

The following cases, among others, have been decided under the Act with reference to petitions based upon alleged breaches of contract :—*Marshall v. The King*, [1923] 2 K. B. 343; *Brocklebank v. The King*, [1925] 1 K. B. 52; *Att.-Gen. v. Wilts United Dairies* (1922), W. N. 217; *Thomas*, 27; and *Moss Steamship Co. v. Board of Trade*, [1923] 1 K. B. 447.

In *Irwin v. Grey*, 3 F. & F. 635, it was held that a Crown servant who recommends the Sovereign to refuse a *fiat* cannot be sued, but in *Re Nathan* (1884), 12 Q. B. D. 479, it was held that where an action against the Crown is neither frivolous nor vexatious it is the duty of Ministers to advise the Crown to affix the *fiat*. This case is of doubtful validity (see Halsbury, vol. 10).

Civil proceedings at the suit of the Crown.—*Proceedings on the Revenue side of the King's Bench Division.*—The King, and also the Duke of Cornwall, a title invariably held by the Heir-Apparent, have the privilege of bringing actions in which the procedure is not only archaic but also severe. These proceedings usually begin with the filing with the King's Remembrancer of a document called a Latin information. These informations are of two kinds, viz., *in rem* and *in personam*. In the former case the Crown is already in possession of land and seeks to have its title confirmed, and in the latter the Crown claims land in the possession of a subject.

Where the Crown claims under a debt of record the action can

be commenced by writ of *scire facias*, but in these cases the writ is usually accompanied by an information.

Informations *in personam* consist of intrusions where it is sought to remove intruders from Crown land, and informations of debt to recover a liquidated amount due to the Crown.

Informations of debt are used in proceedings to recover debts due from the subject.

Common instances of proceedings *in rem* are customs penalties and actions to recover penalties due to the Inland Revenue authorities on behalf of the Crown. The latter are usually commenced by a writ of *subpœna*. Actions for customs penalties frequently begin with a writ of *capias*, which commands the sheriff to seize the defendant and bring him in custody before the Court. The writ of *subpœna* is addressed to the defendant and warns him, under fear of incurring a penalty, to appear before the Court in his own proper person on a given occasion, day, or time. No writ of *capias* is valid until the Attorney-General has authorised its issue, and the *fiat* of a judge is also necessary. After arrest the defendant must, in order to regain liberty, get provisional bail from the sheriff, and then he can appear on giving special bail to the Crown.

The "writ of extent" is the process under which the Crown seises the body, lands and goods, and also choses in action of the defendant, but as a rule the body of the debtor is not seised unless there is danger of the debt being lost to the Crown, and an affidavit is led to that effect. (Steph. Com. III., c. xv.)

When the Crown proceeds against the debtor direct the extent is called an "extent in chief," but where it takes proceedings against the debtor of the Crown debtor it is called an "extent in aid." Formerly under a writ of *quo minus* the subject could get his own debts collected by using the royal procedure, but now no Crown debtor can recover a greater amount than the Crown debt (57 Geo. III. c. 117). Upon an affidavit to the effect that the Crown debt is in danger an "immediate extent" can be issued, and the property of the alleged debtor and his person are seised without an inquisition and office found (*id.*).

When the Crown debtor is dead a writ of *Diem clausit extremum* is issued. The reader is referred for further information to Halsbury, vol. 10, *sub tit.* "Crown Practice."

CHAPTER XIV.

THE CROWN AND THE CHURCH.

Relations between Sovereign and the Established Church.—The Sovereign is the supreme head of the Church of England as by law established (see 1 Eliz. c. 1, reviving the Acts of Henry VIII.). Under the Act of Settlement he must “joyn in communion with the Church of England,” abjure the papacy, and must not marry a papist. He appoints, on the recommendation of the Prime Minister, archbishops, bishops, and certain other dignitaries of the Church. The supremacy of the Crown over ecclesiastical courts is recognised by the appeal to the King in Council—*i.e.*, the Judicial Committee.

The Sovereign convokes, prorogues and dissolves the two Houses of Convocation. Till the reign of Henry VIII. the Pope and not the King was the supreme head of the Church. By the Submission of the Clergy Act (25 Hen. VIII. c. 19), it was provided that a review of the existing canons (*a*) be held, and that no canons repugnant to English law were to bind laymen, and no subsequent canons were to bind laymen. There was no review of the canons, and therefore no canons previous to the Act bind laymen if repugnant to common law, neither do canons passed since the Act (*cf. Bishop of Exeter v. Marshall*, L. R. 3 H. L. 17).

(a) The Canon Law is mainly a body of Roman ecclesiastical law relative to such matters as that Church has been allotted jurisdiction over. It may be said to consist of opinions of the Latin fathers, the decrees of Councils, English and foreign, decretal epistles and papal bulls. In 1151 A.D. the monk Gratian arranged the confused mass of the canon law in the *Decretum Gratiani*. To these were added other works, including the *Extravagantes Johannis* and the *Extravagantes Communes*, and these and all the foregoing, together with the Provincial and Legatine Constitutions and ecclesiastical legislation, may be said to constitute the main portion, at any rate, of the canon law of England. The canons of 1603 A.D. are binding on the clergy and important. (For further particulars see Blackstone I., ch. 3.) Canons are church laws.

Convocation.—The legislative authorities for the Church consist of the Houses of Convocation, and since recent legislation the House of Laymen, but their powers are very limited. There are two Houses of Convocation, viz., the Canterbury and York houses. Each Convocation has an upper and lower chamber. In the upper chamber are the archbishop and bishops, and in the lower are deans, archdeacons, and proctors for cathedral chapters and lower clergy.

When Convocation is summoned, an Order in Council is passed, which enjoins the Lord Chancellor to issue writs to the archbishops. The archbishops then, in accordance with the terms of their writs, issue mandates to cite the bishops, deans, &c., to attend Convocation. Convocation cannot initiate a canon till authorised by the Crown, and a further licence from the Crown is necessary before a canon can be promulged, and it is not in force till promulgation (*Case of Convocations*, 12 Co. Rep. 72).

When Convocation was first originated its sole function was to vote money to the King. When once convoked it began to meddle with legislation, and this usurpation of power appears to have been permitted, as the Submission of the Clergy Act, before referred to, recognised this supposed right partially. After a time there were two Houses of Convocation, but no precise date can be fixed for the creation of the second ecclesiastical synod; after the Submission of the Clergy Act the power of Convocation has been insignificant, as the legislative power of Convocation was further restricted by Acts of Uniformity in the reigns of Elizabeth and Charles II. From the reign of Anne to that of Victoria it was customary to dissolve Convocation almost immediately after its summons, but in 1864 it began to awaken, as it condemned the famous “*Essays and Reviews*,” and again in 1870 it considered the report of the Ritual Commissioners. Towards the end of the nineteenth century the clergy, and also the laity, began to desire the creation of a Church legislative body, and in response to the appeals of devout laymen to participate in Church management, the Primate in 1885 agreed to a House of Laymen debating with his clergy. In 1892 the province of York had a House of Laymen. The final result of all this energy was the passing of the Church of England Assembly

(Powers) Act, 1919. This Act established three legislative houses, namely, (1) the House of Bishops, containing the bishops of both provinces; (2) the House of Clergy, consisting of the lower houses of Convocation of York and Canterbury; and (3) a House of Laymen, elected in accordance with the Act, upon a principle of popular representation. The Act provides that the members of the Houses of Bishops and Clergy shall continue to be members of the assembly after the dissolution of the Convocation until the new Convocations come into being (Cripps, *Church and Clergy*, 7th ed., p. 28).

The three Houses can sit together or separately. By the Act they are to appoint a legislative committee to consider measures voted by both Houses.

On the legislative committee approving a measure they submit the same to the ecclesiastical committee formed by the Act, which consists of fifteen lords and fifteen commoners. This committee, with the sanction of the legislative committee, notifies Parliament and copies of the text of the measure are supplied to both Houses. If both Houses confirm the measure by resolution it is sent up to the King for his assent, and on receipt of same has the power of a statute.

Prayer Book and articles.—All clergy must use the Book of Common Prayer at their services as directed by the Act of Uniformity, and they must also, before ordination, and on taking preferment, assent to the Thirty-nine Articles.

Archbishop of Canterbury.—The Primate is the chief officer in the Church. He ranks before the Archbishop of York, who is not subordinate to him. He is a bishop in his own diocese (Canterbury), and the ecclesiastical superior of all the bishops in his province. Like the Pope did in olden times, he can grant dispensations to marry at any time or place (Stephen's *Commentaries*, vol. 2, p. 721). He can permit a clergyman to hold more than one living simultaneously (*ibid.*, vol. 2). He can claim to crown the King, but it has been said that the Archbishop of York has the right to crown the Queen.

Both the Archbishops can always sit (if they choose) to hear ecclesiastical appeals in the Judicial Committee of the Privy Council.

The Archbishop of Canterbury can grant Lambeth degrees, and does so now and then, to persons who are of eminent piety, but devoid of scholastic attainments.

Archbishop of York.—This functionary is the ecclesiastical superior of all the bishops in his province, who owe him canonical obedience. His duties are almost precisely similar to those of the Primate of all England. Both archbishops present to livings when the bishop of the diocese omits so to do. They are *ex officio* assessors of the Judicial Committee in ecclesiastical appeals.

Bishops.—A bishop has multitudinous duties. He ordains priests and deacons. He helps the archbishop to consecrate other bishops. He licenses curates. He licenses churches and other buildings for public worship. He consecrates churches and graveyards. He confirms persons as a preliminary to receiving the Holy Communion.

No curate can officiate for more than three consecutive weeks in a benefice without the bishop's leave.

The bishop institutes clerks to livings, and collates clerks in cases where he has the right of patronage. Under the Benefices Act, 1898 (c. 48), the bishop may refuse to institute a clerk nominated by the patron in many cases where he was powerless to do so before. He can now insist on a certain amount of pastoral experience, and refuse to institute where the candidate is physically or mentally unfit, of doubtful moral character, or in serious pecuniary embarrassment, or where there has been within twelve months a simoniacal transfer. As to appeal, see section 3. Irrespective of the Act, it is believed that he can refuse to institute where he has good reason for supposing that doctrinal offences will be committed (*Heywood v. Bishop of Manchester*, 12 Q. B. D. 404).

The bishops sit in rotation in the Judicial Committee of the Privy Council to hear Privy Council appeals relative to Church matters (see 39 & 40 Vict. c. 5, s. 14). They have to wait their turn before they can demand a writ of summons to the Lords, unless they become *ex officio* lords of Parliament on becoming

bishops, as is the case with the two archbishops and the Bishops of London, Durham, and Winchester.

Bishops can visit all the clergy in their dioceses, and insist on preaching in any diocesan church. With the bishops also rests the decision whether their clergy shall be proceeded against by the Church Courts. They have to examine candidates for orders, or rather to supervise such examinations (cf. Phillimore's Ecclesiastical Law, 2nd ed., p. 88).

They can in certain cases impose one or more curates on their clergy.

The making and consecrating and enthronement of bishops.—When a bishop dies or retires the Premier sees the King, and a choice is made of some fit person, who must, according to the Rubric, be over thirty years of age. A document, called a *congé d'élire*, is then sent to the dean and chapter bidding them elect a successor, and the dean and chapter then go through a fictitious form of election, as in point of fact they are bound to elect the person nominated in the letters missive, a document which accompanies the *congé d'élire*. After this fictitious election, the candidate for office assents to his appointment before a notary public. After election the new bishop must have the election of the dean and chapter confirmed in the court of an official called the vicar-general of the province. There, persons who object to the appointment have a right to publicly record such objections before the vicar-general, but as this official is only nominally a judge, they gain nothing for their trouble (*R. v. Archbishop of Canterbury*, [1902] 2 K. B. 520). In the newly created bishoprics where there is no dean and chapter, the Crown appoints direct by Letters Patent.

After confirmation the bishop is consecrated, installed in his cathedral, and afterwards, on another day, does homage to the king in respect of his episcopal lands. After all this, he has to wait his turn for a summons to the Lords, unless he is an *ex officio* lord of Parliament.

Deans.—Deans (*decani*) are appointed by Letters Patent, and with the exception of the four Welsh deaneries the patronage of the office belongs to the Premier.

The dean is the head of the chapter (consisting of canons or prebends), which is supposed to be the advisory council of the bishop, but which has no advisory functions. The dean is the superior of the other members of the chapter, and he presides at the election of the bishop. He is the parish clergyman, so to speak, of his own cathedral. He performs the ceremony of enthroning an archbishop and installing a bishop.

The canons and prebends.—These are members of the bishop's advisory council. They have few duties beyond assisting the dean in the cathedral services and signing episcopal leases and grants.

Like the dean, they must reside for a prescribed period in the cathedral city. They have certain duties as to preaching in the cathedral church, and sometimes elsewhere (Phillimore).

No person can be appointed a dean till he has been in priest's orders for six years (3 & 4 Vict. c. 113).

Archdeacon.—This official is a kind of ecclesiastical superior in his district, where, like the bishop, he is a visitor of the clergy. He has certain duties as to directing church and parsonage repairs. He is the nominal head of a court with jurisdiction both civil and criminal, presided over by a judge called the official principal, but this court is now obsolete (cf. Phillimore, 2nd ed., p. 199).

No person can be made an archdeacon till he has been in priest's orders for six years (3 & 4 Vict. c. 113).

The rural dean is an ecclesiastical superior in respect of his ruri-decanal district. He has certain functions incident to repair of Church property. He has certain duties under the old Church Discipline Act, which is now practically only operative as to cases of simony and non-residence; but where there is any clerical scandal in his district he should report to the bishop. He holds ruri-decanal meetings at which his clergy attend.

The parish clergy.—These consist of rectors, vicars, perpetual curates, and curates. A rector takes all the tithes of the benefice, both great and small, whilst the vicar is only entitled to the smaller tithes.

Incumbents of district churches in towns and other populous places may now by Act of Parliament style themselves vicars.

Privileges and liabilities of the clergyman.—A clerk in holy orders is privileged from civil arrest whilst proceeding to the solemnization of Divine service, whilst performing Divine service, and on his way home from such performance. He enjoys the like privilege whilst going to, during, and returning from Convocation (6 Hen. VI. c. 1). He is subject to the canon law, whether he holds any preferment or not, and he can be ordered to pay the costs of proceedings for immoral conduct, and in default of payment can probably be proceeded against under the writ *de contumace capiendo*. He can be tried for simony and non-residence by the bishop under the old Church Discipline Act; for doctrinal offences under the Public Worship Regulation Act, 1874; and for uncleanness and wickedness of life under the Clergy Discipline Act, 1893.

The bishop can veto the proceedings both under the Clergy Discipline Act and the Public Worship Regulation Act. No clergyman can be a member of the House of Commons or a borough councillor, but he may be a county or district or parish councillor. He cannot farm more than eighty acres of land without the bishop's leave, nor can he engage in any trade for profit where there are more than six partners, or unless he has inherited the business. He may be a company director, buy and sell literary productions, edit periodicals, &c., and may be a schoolmaster, professor, university lecturer, dean, tutor, bursar, &c.

A clerk may become a layman by availing himself of 33 & 34 Vict. c. 91. He must give six months' notice, and conform generally to the directions prescribed by the statute.

Again, the bishop has a power, which is very seldom exercised, of expelling a man from the Church. This can be done when the clerk has been found guilty of uncleanness and wickedness of life, and perhaps also in cases of simony and heresy. The ceremony takes place in the cathedral church, and a full account of what was done in Mr. Piggott's (or Smyth-Piggott) case will be found in *The Times* of March 8, 1909.

In this case the expelled clerk was absent. The bishop, after pronouncing sentence, offered up a prayer for his erring brother. It entirely rests with the bishop whether he will unfrock a man or not, and it makes no difference whether the clerk holds preferment or not.

Ecclesiastical courts.—The following are the principal Church courts :—

1. The Court of the Archdeacon, presided over by the official principal, appointed by the archdeacon himself (Phillimore, vol. 1, p. 200). This tribunal is now obsolete, but there is a supposed right of appeal from its decisions to the Court of the Bishop.

2. The Bishop's Consistory Court, presided over by the bishop's chancellor, who must be a barrister of at least seven years' standing. This court has a jurisdiction both civil and criminal, and this jurisdiction extends to clergy and also to laity. It can try clergy for uncleanness and wickedness of life, but not for doctrinal offences. Stephen tells us it can try laymen for fornication, incest, adultery, and other deadly sin, and Professor Maitland thinks it has still jurisdiction over laymen who are guilty of the crime of heresy. It can punish laymen or clergy for brawling (*i.e.*, gross misbehaviour within the precincts of a church or churchyard). It can punish laymen also by keeping them from entering a church, and by refusing them the Sacrament; and where a clergyman refuses the Sacrament to a parishioner the court has jurisdiction. It can mulct clergy, and probably laity, in costs, the payment of which can be enforced by the writ *de contumace capiendo*. The bishop can veto the prosecution of a clergyman for uncleanness and wickedness of life. When the trial is of a quasi-criminal character, the chancellor is assisted by five assessors, who act as judges of fact (Clergy Discipline Act, 1892).

The criminal jurisdiction over laymen is almost obsolete, save perhaps as to brawling. According to Mr. Eustace Smith, the chancellor can punish laymen by admonition (reprimand only by judge), penance (obsolete), expulsion from the Church (*ab ingressu ecclesiae*), and by excommunication. Excommunication is of two kinds, the less and the greater. The less excludes a

man from the services and sacraments, and the greater cuts him off, or is supposed to cut him off, from the fellowship of the faithful (Phillimore, vol. 2, p. 1087).

Formerly, the excommunicated man had not the privilege of serving on a jury, neither could he give evidence in court, or bring an action to recover property, but by 55 Geo. III. an imprisonment up to six months could be imposed for the greater excommunication, but the excommunicated man is to labour under no incapacity.

As regards civil jurisdiction, a great deal depends upon the patent to act as judge given by the bishop to his chancellor; but, speaking generally, the chancellor grants faculties for alterations in churches, has a supposed jurisdiction as to mortuary fees or corse presents, and deals with questions of repairs of Church fabric and property, and also with disputed rights to pews.

3. The Court of the Bishop sitting in person to try cases under the Church Discipline Act, *e.g.*, simony and non-residence. This court hardly ever sat, as the bishop had a habit of sending the case for trial before the Dean of Arches by Letters of Request.

4. Arches Court. The judge of this court is the Dean of Arches.

The court has cognizance of ecclesiastical appeals from the Consistory Courts of the Bishops in the province of Canterbury, and has taken over the functions of the old Provincial Court of the Archbishop of Canterbury. The Dean of Arches has jurisdiction *quâ* Dean of Peculiars over the thirteen peculiar parishes in the diocese of London which formerly were within the peculiar jurisdiction of the Archbishop of Canterbury. The dean is also the judge under the Public Worship Regulation Act, 1874, for the trial of doctrinal offences and practices. He is also usually Master of the Faculties to the Archbishop of Canterbury (37 & 38 Vict. c. 85, s. 7).

5. The Provincial Court of the Archbishop of Canterbury still exists in theory, but in practice the Dean of Arches hears all Consistory Court appeals.

6. The Provincial Court of the Province of York. This court takes cognizance of appeals from the Consistory Courts in the

diocese, and, as regards York, is a Consistory Court of first instance. The judge is the Dean of Arches.

7. The Court of the Archbishop, presided over by himself or his vicar-general, which can try bishops for ecclesiastical offences and also persons accused of heresy in the province.

8. The Judicial Committee of the Privy Council, which is the supreme court of appeal in all matters ecclesiastical.

CHAPTER XV.

ARMY AND NAVY.

Military law.—Soldiers and sailors, like other citizens, are subject to the ordinary law of the land, but, in virtue of their profession, they are also subject to military law. The Navy is a standing force, though the necessary supply must be voted annually. The regular Army is not, in theory, a standing Army. It depends for its existence on the passing of the Army (Annual) Act, which specifies the number of troops and continues for one year the provisions of the Army Act (44 & 45 Vict. c. 58), which provides for the regulation of the force and the maintenance of discipline therein. For the history of our military forces see Anson, vol. 2, pt. 2, pp. 167 *et seq.*, Clode's Military Forces of the Crown, and Manual of Military Law, ch. 9.

The Soldier.—Like the sailor, the soldier can be tried for military offences by court-martial, and when his regiment is out of England he can be tried by court-martial for crimes against civilians where there is no civil court with criminal jurisdiction to try him within 100 miles in a straight line. When a soldier is unfairly sentenced by a court-martial he can get his case reconsidered by the Judge-Advocate General, and where the action of the court-martial is *ultra vires* he can apply, according to circumstances, for a writ of *habeas corpus* or *certiorari*, or where he wishes to stop the proceedings he can apply for a prohibition (Manual of Military Law, ch. 8) (a). By the Soldiers and Sailors Act, 1918, soldiers and sailors are enabled to make informal wills and, under certain circumstances, these wills are valid even though they are under age.

(a) Any person, however, having cause of action or suit against a soldier of the regular forces may, notwithstanding anything in this section (section 144), after due notice in writing given to the soldier or left at his last quarters, proceed in such action or suit to judgment, and have execution other than against the person, pay, arms, ammunition, equipments, regimental necessities or clothing of such soldier.

The estate of a soldier falling in battle is not liable to estate duty. A man enlists as a soldier by subscribing to a declaration in the presence of a justice of the peace and taking the statutory oath; and a man becomes an officer by acceptance of his Majesty's commission. When an officer has accepted a commission, he holds it at the royal pleasure, but he cannot resign that commission without leave of the proper authorities (*Manual of Military Law*, ch. 11; *Hearson and Churchill*, [1892] 2 Q. B. 144).

Military tribunals.—The commanding officer has power to deal with petty offences by fine up to a certain amount, and by imposing imprisonment for a limited number of days. The jurisdiction is explained clearly in section 46 of the Army Act. There are four military courts, viz. :—

The regimental court-martial.—This tribunal must consist of not less than three officers, each of whom must have been a commissioned officer for not less than one year, and, with certain exceptions mentioned in section 47 of the Army Act, the president must not be under the rank of captain. This Court may not award imprisonment beyond forty-two days, nor can it discharge accused with ignominy. It must be convened by a proper convening officer.

District court-martial.—A district court-martial shall be convened by an officer authorised to convene the same (see Army Act, s. 128); and it must consist of not less than three officers, each of whom must have held a commission during not less than two years. A district court-martial cannot try a person subject to military law as an officer, nor award sentence of death or penal servitude, but merely imprisonment up to two years. A general court-martial only may try an officer.

General court-martial.—This tribunal may inflict any sentence, including death or penal servitude. It must consist of not less than five officers, who have held commissions for not less than three years, and the president of either a district or general court-martial must be a field officer, except in cases mentioned by the Act (see section 46).

Field court-martial.—This court may be convened on active service or in countries beyond the seas in cases where, in the opinion of the convening officer, a general court-martial is impracticable. (See Manual of Military Law, p. 49.)

General powers of courts-martial.—The jurisdiction of courts-martial and the offences of which they may take cognizance, are dealt with by the Army Act. For reasonable cause shown an accused may challenge a member of a court-martial to whom he objects; but unlike the civil felon or traitor, who has a right of peremptory challenge of his judges of fact (the jury), he must show cause. The members of the court-martial (whether military or naval) are judges of fact as well as of law.

The Army Act provides that where a field officer is placed on his trial, no person below the rank of captain can serve on the court-martial.

The sentences of district, regimental and general courts-martial cannot be carried out unless they are confirmed by the proper authorities mentioned in the Army Act. It is impossible to set out the numerous crimes of which courts-martial can take cognizance, but they can deal with numerous offences which are not *mala in se*—e.g., cowardice before the enemy (death); falling asleep or being drunk whilst acting as sentry in time of war (death); malingering, defiance of the orders of a man's superior, striking an officer (death), &c., &c.

Drunkenness, whether on duty or not, is severely punished, comparatively speaking. One noticeable feature of the military penal code is the severe punishment (death) for mutiny or sedition, concealment of mutiny or sedition, &c. (Army Act, s. 7).

Section 45 of the Army Act provides that the charge made against every person taken into military custody be investigated without unnecessary delay by the proper military authority, but there appears to be now no legal remedy, as there is no time fixed for the trial of a military person accused of a military offence. Where an officer or a soldier has cause to complain of the action of any superior officer, means of redress are afforded to him by sections 42 and 43 of the Act. It may be that a civil judge, when asked to interfere, would, before granting relief, be

guided by the fact as to whether the complainant had or had not availed himself of the protection conferred by these sections.

Section 162 of the Army Act, 1909, provides that "where a person is sentenced by a court-martial in pursuance of the Act to punishment for an offence, and is afterwards tried by a civil court for the same offence, that court shall, *in awarding punishment*, have regard to the military punishment he may have already undergone, and that when a person subject to military law has been acquitted or convicted of an offence by a competent civil court, he shall not be liable to be tried by court-martial for that offence. See, too, section 46 (7).

In addition to the prisoner having the benefit of challenging members of courts-martial for cause shown, the members of a court-martial are sworn to try the case fairly. All witnesses are examined on oath, and English rules of evidence are to be observed. Civilians may be called as witnesses and are paid for their attendance, and on refusal to attend or take the oath or affirmation, or answer questions, may be reported to the civil power and dealt with as if they were guilty of a contempt of a civil court (section 126).

Naval courts.—The commanding officer of a ship may administer a short period of imprisonment, viz., three months, for divers offences which are not of a serious character. The constitution of a court-martial varies according to the rank of a person tried, and all naval courts-martial must be general courts-martial with power to award any punishment, including death. All naval courts-martial must be held on board a man-of-war.

A court-martial must consist of not less than five or more than nine members. To secure impartiality no person prosecuting can act as judge. Naval offences are very severely punished, and naval courts-martial have drastic powers over naval persons. Ordinary civilians who have been summoned to give evidence before them, and are guilty of contempt, are dealt with by a civil court of competent jurisdiction.

Justice and procedure at naval courts is regulated by the Naval Discipline Acts, 1866 and 1884, and the Naval Regulations.

Certain offences can be punished by a naval court-martial which are punishable by naval custom.

Naval courts-martial, like military courts, take cognizance of several offences which are not *mala in se*.

Sailors and soldiers are primarily bound to obey the civil law, even though such obedience may render them liable to trial by court-martial.

Enlistment.—In the Regular Army the terms for enlistment vary, and in the new Territorial Force enlistment may be for a fixed period, which must not exceed four years, though the territorialist may re-enlist. Any territorialist may retire on giving three months' notice and payment of a fine not exceeding £5.

A private in the regulars may purchase his discharge within three months after enlistment by paying £10. His Majesty may in times of danger retain the services of the soldier though the time for which he enlisted has expired. By section 96 of the Army Act the master of an apprentice may, subject to certain reservations, by adopting certain police court procedure, claim from the military authorities his apprentice.

The apprentice must be bound by a regular indenture for four years, and have been under sixteen when bound apprentice.

Ordinary sailors join the Navy by enlistment, impressment being now obsolete, though never formally abolished. (See May, Constitutional History, vol. 3, p. 21.)

History of the armed forces.—Prior to the Conquest all free-men between fifteen and sixty who were capable of bearing arms had to serve in the fyrd or general levy, and those who evaded service had to pay a fyrd-wite, a penalty which might extend to entire forfeiture of land. There was a levy for each county, presided over by the earldorman or earl. The general levy was a civil as well as a military force, and in its civil capacity it was used to suppress riots and known as the sheriff's *posse comitatus*. As a military force it could be used to resist insurrections or foreign invasion. It was not bound to serve outside England—Scotland and Wales perhaps excepted. In the reign of Edward VI. we find the lord lieutenant of each county com-

manding the fyrd, or the militia as it was afterwards called, instead of the earldorman (*Military Handbook*, p. 147). After the Conquest came the feudal levy, which could be called upon to fight out of England for forty days, and when forty days was not sufficient the Kings were to pay them. All military tenants served at their own expense. Service in the feudal levy was supposed to be personal, but the clerical baron, *e.g.*, the bishop, paid a composition in lieu of personal service.

Henry I. is reported to have invented scutage (shield money), also called escuage, whereby personal service was dispensed with and the military tenant, instead of serving forty days, had to equip and maintain a knight to serve for longer than forty days.

Scutage formed one of the grievances of Magna Charta, and after 1215 A.D. it was supposed not to be levied without the consent of the Great Council and afterwards of Parliament.

In the reign of Edward I. we hear of commissions of array, which were a form of compulsory military service for wars, both foreign and domestic. Compulsory service was much resorted to during the Wars of the Roses, and also in Tudor times. Impressment for military service was declared illegal by 16 Car. I. c. 28. After the Restoration military tenures were abolished and, with them, scutage. The militia was retained, and the King had also a bodyguard. Charles II. raised a certain number of regiments by voluntary enlistment, and James II. raised an army in the same way, which caused such apprehension that a standing army was forbidden by the Bill of Rights. It was, however, soon found that a standing army was necessary, and this form was kept up by Annual Mutiny Acts. These statutes were called Mutiny Acts till 1881, when the Army Act—forming to a large extent a military code—was passed. This Act is annually renewed by a short statute known as the Annual Army Act.

For the Great War military service was made compulsory, but up to 1914 the Army was composed of regular troops, militia, territorials and reservists. Reservists were divided into two classes, *viz.*, the army reserve and the militia reserve, enlistment in which closed after April, 1901. The militia reserve was known as the special reserve.

The Territorial Army.—By the Territorial and Reserve Forces Act, 1907, the auxiliary military forces of the Crown (militia, yeomanry and volunteers) were reorganised. County associations were created, and power was given to the Army Council to prepare schemes for the internal management, incorporation and constitution of the Territorial forces. The proper functions of a county association (section 2) are to master the directions of the Army Council as to the particular county force and to make a study of all statistics and county resources in order to advise the Army Council as to same.

Though the Army Council pay the expenses of the county association, the latter body is practically entrusted, subject to the supervision of the former body, with the entire management of the county Territorial force.

It has to recruit fresh soldiers, provide camps and rifle ranges and also land for military manœuvres.

It can, and ought, to establish battalions of cadets and rifle clubs, but no public money must be spent upon boys under sixteen.

All orders and regulations made by the Army Council must be laid before Parliament.

The force is only liable to serve in the United Kingdom, but it may offer to serve abroad. It has to undergo an annual training of not more than fifteen days or less than eight days. The Crown can embody the force by a proclamation which calls out the Army Reserve, unless the two Houses present an address to veto such embodiment. If Parliament be not sitting when such embodiment takes place, the Crown must convene it within ten days of embodiment.

Territorialists can be tried by court-martial when they do not attend on embodiment of the force and where they neglect to carry out conditions as to training. Whilst under training, or when embodied, they are subject to military discipline.

Part III. of the Territorial Army Act deals with a new force of reserves called special reservists, which is to consist of reservists who have not served in the Regular Army.

By the Territorial Army and Militia Act, 1921 (c. 37), the

Territorial Force, created by the Territorial and Reserve Forces Act, 1907, is to be called the Territorial Army.

Section 2 provides that that portion of the army reserve known as the special reserve shall be called the militia.

Section 4 provides that the power to raise a militia (b) force and a yeomanry force shall cease.

(b) At common law, His Majesty's subjects between eighteen and thirty had to be balloted for the militia, a force which could not be compelled to leave the country (16 Car. I. c. 28, s. 16). This body was regulated by statutes of the reigns of George III. and Victoria, but for some considerable time balloting for the militia has been suspended by annual statutes though capable of revival by Order in Council, and the suspension is still continued though the old militia has been merged in the Territorial Army. The ancient fyrd or militia was not compellable to leave the country save in cases of necessity.

CHAPTER XVI.

THE COUNCILS OF THE CROWN.

The three councils.—The King has three councils, viz., the House of Lords, the Privy Council, and the Cabinet. The right of the House of Lords to style itself a council is practically non-existent, as the last time the Sovereign convened it as such was in 1688. Any lord of Parliament may, however, demand access to the King to tender him counsel (*a*).

The Privy Council has at present no deliberative functions, but is to all intents and purposes a constitutional machine for giving effect to the decisions of the Cabinet.

According to Sir William Anson every council tends to follow a certain evolution. First it increases in numbers. Next, a kernel or nucleus forms inside it, and, gradually getting bigger, eats it up. Then the kernel or nucleus gets bigger, another kernel forms inside the first kernel, and the same process is repeated.

The King's continual council was the *nucleus* which formed inside the *Magnum Concilium*. The continual council got larger; and another council (now known as the Cabinet) formed inside it.

History of the Cabinet.—We know nothing definite about the Inner Council of State, out of which the Cabinet was gradually evolved, till the reign of Henry VIII.; but according to Langmead there were indications of such a council before the time of Henry VII. The Privy Council was, *tempore* Henry VIII., known as *Concilium Privatum*, and besides this there was a small *coterie* of permanent advisers of the Sovereign called by some authorities the *Concilium Ordinarium*. (The subject is fully discussed in Anson, vol. 1, pp. 65-68, and in Feilden, pp. 42-46, 48 *et seq.*) The members of the *Concilium Ordin-*

(*a*) Professor Lowell says that the peer desiring access for this purpose must obtain an appointment with the Sovereign through the Home Secretary.

cium, however, were in no sense members of a Cabinet as we understand it, though a little later on Bacon describes them as the Cabinet, and comments on them, under that name, somewhat slightly.

According to Mr. Trail, what we now call the Cabinet has gone through four phases :—

In the first phase it was a small, irregular *camarilla*, consisting of persons of the King's choice. These men had to agree with the King in everything. They gave the Sovereign private advice, but performed no executive functions. During this phase the inner council had no particular name.

In the second stage, this inner body of councillors is called the Cabinet, "but it did not displace the Privy Council from its position as *de jure* as well as *de facto* adviser to the King."

"The third phase commenced with the reign of William III. In this stage the Cabinet was unknown to the law, but it became the *de facto* adviser to the Crown vice the Privy Council, though not the adviser *de jure*."

"In the fourth phase (the present one) the Cabinet is still unknown to the law, though it has displaced the Privy Council as the executive authority in the State. It consists of a body of men known only to the law as Privy Councillors. It is indirectly chosen by the predominating party in the Commons, and consists of men who, though in many respects their political views may be divergent, have agreed to a definite political programme."

The Cabinet first emerges clearly in the reign of Charles II. Always secretive and given to intrigue, Charles would, before any matter was brought before the Privy Council, consult a small ring of confidential advisers. Sir William Temple objected to this procedure, and at length persuaded Charles to agree to a new plan, which was to reduce the size of the Privy Council from fifty to thirty members. It was hoped that the reduced council would form an efficient working body, but Temple frustrated his own scheme by forming a clique inside the council. The Cabinets both of William and Anne were frequently chosen from both parties, though William had occasionally to recognise that there was such a thing as Party Government (cf. Todd, vol. 2, p. 71; Anson, vol. 2, ch. 25).

It was not, as before stated, till the advent of Mr. Pitt's Ministry in 1783 that the idea of a Cabinet consisting of persons willing to adhere to a fixed programme became definitely established (cf. Todd, vol. 1, p. 58).

The Premier and Cabinet.—*Composition of the Cabinet.*—The Cabinet consists of a group of Ministers—most of them heads of great Departments of State—who are agreed to pursue a common policy under a common chief, the Prime Minister. Not all heads of great Departments, however, are in the Cabinet, nor are all members of the Cabinet heads of great Departments. The Postmaster-General, for instance, and the Secretary for Scotland are sometimes included and sometimes excluded: while holders of administrative sinecures such as the Lord Privy Seal and Chancellor of the Duchy of Lancaster are almost always included. The following are invariably members of the Cabinet: the six Secretaries of State, the First Lord of the Treasury, Chancellor of the Exchequer and Lord President of the Council. Heads of Departments who are not in the Cabinet, and Under-Secretaries of all the Departments, are nevertheless members of “the Government.”

All Cabinet Ministers are *ex officio* Privy Councillors.

Ministerial and Cabinet Responsibility.—This expression, as Dicey has pointed out, means two different things. First, it means that as a matter of law some Minister is responsible for every executive act of the Crown. Orders in Council, royal warrants, proclamations, &c., whereby the royal will is expressed must be countersigned by one or more Ministers, who thereupon become answerable in the Courts of law for any illegality to which these instruments may seek to give effect. Ministerial responsibility in this sense is a corollary of the maxim “The King can do no wrong”: it implies that for every exercise of the prerogative the King is not, but some Minister is, answerable.

More frequently, however, the phrase is used to denote the collective responsibility of the Cabinet to Parliament for all political action of Ministers and for the policy of the Government as a whole. Here we are in the sphere not of law but of convention, and convention prescribes that the Cabinet must in all

circumstances agree. If disagreement manifests itself on any except insignificant points of policy, either the Cabinet as a whole, or the dissentient Ministers, must resign. In no case may a Minister disavow, either expressly or by implication, the policy of his colleagues so long as he remains their colleague.

In this sense, then, the Cabinet is "collectively" responsible. When it is said to be responsible to Parliament, what is meant is the convention that when their policy—which, as we have seen, must be joint and unanimous—is condemned by the House of Commons, they must resign. Such condemnation may be expressed in two ways : either a measure of substantial importance, introduced or adopted by the Government, may be rejected, or a vote of censure may be carried against the Government. Resignation in the latter case is now invariable. When a Government Bill is defeated, the modern tendency is to consider, before resigning, first whether the bill is important or trivial, and secondly whether the defeat registers a considered judgment of the Commons or is a mere accident. Where the measure is insignificant or, though important, is defeated on a "snap" division, modern practice has relaxed the rigour of the old rule which required resignation to follow upon the defeat of any Government measure whatever. Whether the innovation is likely to remain, or has justified its existence, it would take us too far afield to consider.

Relations between the Cabinet, the Premier and the Crown.—The Sovereign acts exclusively on the advice of the Cabinet, tendered as a rule through the Prime Minister. By a convention of the Constitution, not only must he act on that advice, but he may accept no other.

The Cabinet on their side are bound to keep the Sovereign informed of any departures in policy, of the general march of political events, and in particular of the deliberations of the Cabinet, which may not be disclosed to anyone else.

This duty, again, is generally performed through the instrumentality of the Prime Minister, who until quite recently had to write, after each Cabinet meeting, a letter to the King recording the topics it had considered and the decisions it had taken. On all important matters of State the Premier has the exclusive right

to approach the Sovereign, though other Ministers have a right to discuss with him matters which are merely departmental (Todd, vol. 2, p. 208).

As a matter of law the King is entitled at any time to dismiss his Ministers and to dissolve Parliament. This power was exercised in 1784 by George III. and in 1834 by William IV. In the first case the action of the Sovereign was endorsed by the electors, in the second disapproved. On both occasions it was by many protested against as unconstitutional (b). Unconstitutional it would, in all probability, be considered to-day.

The Prime Minister.—No such officer as the Prime Minister or Premier is known to the law. Like the Cabinet, he is the creature of convention. He is mentioned in the Treaty of Berlin, 1878, and in a Royal Warrant dated December 2, 1905, which gives him precedence immediately after the Archbishop of York; otherwise we think there is no reference to him in any similar public document. But as the Cabinet formed within the Privy Council, so within the Cabinet, from the time of Walpole onwards, one man came to be recognised as possessing predominant authority. Walpole, the first Prime Minister in the modern sense, insisted that he was merely *primus inter pares*; and such, even in relatively recent times, has been considered to be the Premier's true position.

George I. and George II. could not speak English, and therefore could not effectively preside at Cabinet meetings. Some Minister had to take the King's place, and this Minister came to be called the Premier or Prime Minister. But in the eighteenth century, until Pitt's accession to office in 1784, the status of Prime Minister was ill-defined, and at times, *e.g.*, in the Coalition of Fox and North in 1873, he was a mere figurehead (the Duke of Portland). In 1803 Pitt expressed the view that there must be "an avowed and real Minister possessing the chief weight in the Council and the principal place in the confidence of the King."

At the present time the Prime Minister is selected in form by

(b) Cf. Burke's denunciation of the "penal dissolution" of 1784.

the King, in fact by the majority of the House of Commons, which will not maintain in office any Premier who does not possess their confidence. Circumstances can, however, be imagined in which the King's choice is no mere formality, *e.g.*, where either of two party leaders, if sent for by the King, would be able to form a Government and command the support of the Commons. Such a case furnishes an illustration of one of the few powers left in the King which are exerciseable otherwise than on the advice of Ministers. For though the King may ask an outgoing Prime Minister's advice as to his successor, and if he does so may be bound by the advice tendered, he is not bound to invite advice at all (Lowell, *Government of England*, I., p. 134).

The Prime Minister superintends and co-ordinates the work of all the Departments, though departmental matters must in the first instance be submitted to the heads of the Departments themselves. He assumes responsibility for all the activities of his colleagues. He appoints these colleagues and can require their resignation, though in the exercise of both powers he is, of course, controlled by the opinion of his party, of the House of Commons, and ultimately of the country. He presides in the Cabinet, and is the regular (though not the only) organ of communication between Ministers and the Sovereign. Generally, but not invariably (*d*), he combines with the position of Prime Minister the office of First Lord of the Treasury : sometimes other offices — *e.g.*, that of Chancellor of the Exchequer (Mr. Gladstone) or Foreign Secretary (Mr. Ramsay MacDonald). If he is in the House of Commons (and it seems likely that no future Prime Minister will be in the House of Lords), he is generally (but again not without exception (*e*)), Leader of the House. As such he is responsible for the apportionment of Parliamentary time between the measures or other business which compete for it.

The King.—The King is by no means a cypher in the Constitution.

Owing to his peculiar position, he has a unique experience of

(*d*) In Lord Salisbury's last Administration, Earl Balfour was First Lord of the Treasury.

(*e*) *E.g.*, in Mr. Lloyd George's Coalition Government Mr. Bonar Law was for a time Leader of the House of Commons.

the inner workings of ministry after ministry. He has been the repository of many State secrets. The views, therefore, which he is pleased from time to time to express to his Ministers on domestic, and perhaps even more on foreign, policy naturally carry considerable weight with them.

The King is obliged to be in the confidence of his Cabinet. He is supposed to see his Ministers in private. The question arose after the marriage of Queen Victoria. Ministers did not like the presence of the Prince Consort at audiences. Mr. Gladstone in his "Gleanings of Past Years" defined the true position of the late Prince Albert when he remarked that the Sovereign may take counsel with anyone, subject only to the condition that the relationship existing between him and his Ministers is not disturbed. Though the Sovereign cannot take counsel with the Opposition, he may speak freely with others. As to letters from foreign potentates, the rule now is that all correspondence must pass through a Minister where the foreign ruler is not the Sovereign's relative (f).

(f) Lowell, *Government of England*, I., p. 37.

CHAPTER XVII.

THE PRESENT PRIVY COUNCIL—COUNCIL OF DEFENCE.

The present Privy Council.—This Council is now, as Sir William Anson points out, the machinery by which the Cabinet expresses the royal pleasure, which is signified for the most part in two ways :—

1. By Proclamation ;
2. By Order in Council.

When it is desired that the entire country should know the will of the Executive, a Proclamation is resorted to, and in other cases an Order in Council is usually made.

Orders in Council.—Apart from the King's regulations for the Army and Navy, and legislation for Crown colonies and protectorates, Orders in Council are now largely made in pursuance of express statutory powers. Very numerous statutes authorise what may be called subordinate legislation by Order in Council. They authorise the framing of schemes, or the introduction of postponed provisions, or the temporary application of certain statutory provisions to special areas. The provisions of the Extradition Acts are applied by Orders in Council to the States with which treaties have been made, and courts for the trial of British subjects in barbarous countries are created by this machinery under powers given by the Foreign Jurisdiction Act, 1890.

Most of the executive or administrative business formerly transacted by the Privy Council has now been transferred to other departments of government.

The Judicial Committee of the Privy Council.—This committee was constituted by statute in 1833, a period when appeals to the Privy Council were far less common than at present.

The few appeals before the creation of the Court were attended to by judges during the Long Vacation, but now, by the Judicial

Committee Act, 1833 (c. 41), a committee has been constituted which now hears (1) appeals from the Colonies; (2) Indian appeals; (3) appeals from the Channel Islands and Isle of Man; (4) appeals from the Ecclesiastical Courts; (5) appeals from Consular Courts; (6) appeals from Prize Courts.

Formerly the Council could hear questions of title to old peerages and questions as to the legality of a peerage grant should the King refer the question to them, and might do so now if a Committee of Privileges was not available. The Judicial Committee formerly adjudicated on applications for prolongation of patents, but this jurisdiction has been transferred to the High Court (Patents Act, 1907, s. 18).

The *ex officio* members of the Judicial Committee include (under the Act of 1833) (1) persons who hold or have held the office of Lord President or Lord Chancellor, or any of the high judicial offices mentioned in the Act, (2) persons who have held or hold the high judicial offices mentioned in the Appellate Jurisdiction Acts, 1876 and 1887, (3) certain Indian judges if members of the Privy Council. By 58 & 59 Vict. c. 44 it was provided that judges of self-governing Dominions of the Crown should, if members of the Privy Council, be members of the Committee. In cases arising under the Clergy Discipline Act, 1893, there are three prelates in attendance as assessors, and the three who are on the rota for any given sitting attend. These assessors can hardly be called judges, as they are not responsible for the judgments. They merely give their opinion, and the Board asks their advice upon matters with which it is not familiar (Encyc. Laws of England, vol. 2, p. 648). In Admiralty appeals from the Colonial Courts two assessors are usually in attendance. The following have the right of audience before the Committee: English, Irish, and Scotch barristers and also certain Indian and Colonial practitioners. Privy Council agents consist of solicitors, Scotch Writers to the Signet, and Irish solicitors, provided that their names are on the Privy Council roll. The jurisdiction of the Judicial Committee depends on the King referring matters to them either on the petition of litigants or of his own motion. In the latter case either general or particular questions may be referred. While most of the Committee's time is occupied in

*
hearing appeals arising in the ordinary course of litigation, section 4 of the Judicial Committee Act, 1833, provides that the King may refer to the Committee any matter he may think fit, and it was under this provision that the Crown recently referred to it certain matters concerning the frontier of Northern Ireland and the true construction of the Irish Treaty Act. For another exercise of the same power, see *Speaker of House of Assembly of Victoria v. Glass* (1871), L. R. 8 P. C. 560; *infra*, p. 208. Where the Judicial Committee hears an appeal against the dismissal by the Governor of a Colonial judge, the Colonial Secretary sits with it. In ecclesiastical cases the Privy Council will not hear an appeal where the bishop has a discretion, *e.g.*, revocation of a curate's licence and cases arising under the Benefices Act.

Only one judgment is delivered by the Board in each case, and this is not in theory a judgment but merely a report made to His Majesty of the reasons why judgment should be given in favour of a particular litigant. It is therefore impossible to discover whether the decision of the Board was unanimous or by a majority, and, if so, by what majority.

Position of Privy Councillor.—Privy Councillors are nominated by the Sovereign, and on appointment they attend and kiss the King's hand, and also take the Privy Councillor's oath.

Privy Councillors are in the commission of the peace for every county in England, and hold office during the life of the King, though, as a matter of course, the new Sovereign continues them in office, and he must conventionally continue in office such of them as belong to the Cabinet at the time of the demise of the Crown. A man is dismissed from the Privy Council by the Sovereign erasing his name from the roll of Privy Councillors. Persons are now frequently appointed Privy Councillors because they have distinguished themselves in some walk of life, and not because the King wants their assistance, and they probably never exercise the functions of a Privy Councillor. The head of the Privy Council is the president of the Council, who is generally an experienced Cabinet Minister. The duties of the post are not onerous. All Cabinet Ministers must not only be members of the Privy Council, but also members of the Lords or the Commons; but Sir William Anson says an exception was

once made in the case of the late Mr. W. E. Gladstone, who held office for three or four months without having a seat. There has been at least one other instance since then, namely, the case of Mr. Winston Churchill.

The Council of Defence.—Its proper designation is the Committee of Imperial Defence. When Lord Salisbury came into power in 1895, a Committee of National Defence was created, and this committee was composed of members of the then Cabinet.

Since 1904, however, the constitution of this body has undergone alteration, as it now consists not only of Cabinet Ministers but also others, including often members of the Opposition. The idea is to create a council with a continuous policy independent of party politics, combined with full recognition of Cabinet control (*a*). The Council's powers are advisory, not executive, but its recommendations always carry great weight with the Cabinet.

(*a*) This Council, in its present state, cannot in any way be considered an inner council within the Cabinet, though at one time it perhaps was.

CHAPTER XVIII.

SECRETARIES OF STATE AND THEIR UNDER-SECRETARIES.

History of office of Secretary of State.—Secretaries of State are channels of communication between the Crown and subject. There was a King's clerk in the time of John, and in the reign of Henry III., when the Chancellor (*i.e.*, the progenitor of the present Lord Chancellor) became too busy to do clerical drudgery, a confidential clerk was appointed (*secretarius*). In the reign of Henry VI. there were two King's clerks, and in the reign of Edward IV. one of these was known as head clerk or chief secretary. When the Crown work was in after times very heavy, three secretaries were necessary, but, strange to say, there were two only in the year 1794. According to Professor Maitland, there were three in 1801, *viz.*, one for home affairs, one for foreign matters, and a third for war and colonial work. In 1854 there was a Secretary for War appointed, and in 1858 the office of Secretary of State for India was created after the suppression of the Mutiny.

The Secretary of State did not become the great executive officer he now is until the business formerly transacted by the Privy Council committees was transferred to Government departments.

Henry VIII. allotted to his secretaries precedence at court functions, but notwithstanding this, they were on one or two occasions treated as common clerks by the Lords of the Council in the reign of William III. Secretaries of State, if commoners, now come in the table of precedence next after the Vice-Chamberlain of the Household.

Present Secretaries of State.—As will be seen above, the Secretaries of State are now six in number, *viz.*, the Foreign Secretary, the Home Secretary, the War Secretary, the Colonial and Indian Secretaries, and the Secretary of State for Air (Air Force Constitution Act, 1917 (c. 51).

They can all do each other's work. Prof. Maitland quotes one exception, and tells us that it is the Home Secretary alone who can deal with the Act to amend petitions of right (Petition of Right Act, 1860). But there appear to be other exceptions created by statute: see, for example, the provisions of the Government of India Act, 1858, as to the Indian Secretary. It is doubtful whether the Secretary for Scotland and the Secretaries of State can interact.

Each Secretary of State is assisted by a Parliamentary Under-Secretary and by a Permanent Under-Secretary and official staff.

The Secretary of State is appointed by delivery to him of the seals of office. Only five Secretaries of State can sit in the Commons.

Under-Secretaries.—Each Secretary of State is assisted by a Parliamentary Under-Secretary, appointed by himself. The Parliamentary Under-Secretary is a subordinate member of the Government, changing with the Ministry. Only five Under-Secretaries can sit in the House of Commons (see 27 & 28 Vict. c. 34); consequently one Under-Secretary at least must be in the House of Lords. An Under-Secretary does not vacate his seat in the Commons by acceptance of office (see 21 & 22 Vict. c. 106) (a).

Professor Maitland further states that Secretaries of State have extensive common law and statutory powers, and he says "it seems certain that they may commit persons to prison for treason or treasonable offences," though he admits the power is now never exercised. He quotes the prosecution of the editor of the *North Briton* newspaper (Constitutional History, p. 410).

(a) For a detailed account of the history of the office of Secretary of State and his duties, see Trail, *Central Government*, pp. 55 *et seq.*

CHAPTER XIX.

THE PERMANENT CIVIL SERVICE.

Each important department of the Executive has a Parliamentary head who controls the general policy of that department, but who is necessarily assisted by a large subordinate staff. The Parliamentary Chief, of course, can only deal with matters of importance, but all the business of the department is conducted in his name, and he is responsible for it to Parliament. The staff of the executive departments constitute the Civil Service. Judicial officers hold their appointments during good behaviour, and their salaries are charged on the Consolidated Fund. Civil servants, on the other hand, hold their posts "during pleasure" (cf. *Young v. Weller*, [1898] A. C. 661), and their salaries are charged on the annual votes. Though technically a civil servant holds during pleasure, practically he has security of tenure, and the service is known as the permanent Civil Service. If an office is reorganised, and the services of a civil servant are dispensed with in consequence, provision is made for compensation. A civil servant is entitled to a pension at 60, and he must retire on pension at 65, unless for special reasons he receives an extension not exceeding five years. A civil servant is not disqualified from voting at a parliamentary election, but if he wishes to stand for Parliament he must resign his appointment. With the exception of the Foreign Office the entry into either the First or Second Division of the Civil Service is by competitive examination. But certain of the higher appointments, and the appointments requiring professional qualifications, are exempted from the examination rule, the Minister making the appointment direct. The office of a Secretary of State may be taken as a type. The Secretary of State is a member of the Cabinet, and, of course, goes out with the Government. He is assisted in his parliamentary work by a Parliamentary Under-Secretary, who, in addition to his

parliamentary duties, does such office work as may be arranged for by his chief. If both Secretary of State and the Parliamentary Under-Secretary sit in the House of Commons, some peer is selected, who answers for the department in the House of Lords. At the head of the office is the Permanent Under-Secretary of State, who sometimes has risen in the office itself, but who is not infrequently chosen from the outside. There are, as the case may be, two or three Assistant Permanent Secretaries, and under them a sufficient number of clerks of different grades. The subordinate departments of the Government are for the most part placed under the general control of one of the great departments. The proceedings of the subordinate departments or boards are conducted in the name of that department, but all matters of importance have to be referred to the higher authority. For example, many orders would be made in the name and under the authority of the Commissioners of Metropolitan Police or of the Prison Commissioners, but these departments are under the supervision and control of the Home Secretary, and all matters of first-rate importance must be referred to him (see, further, Lowell, ch. 7).

Executive appointments generally are held "during pleasure." But certain officers, who perhaps might be classed as civil servants, by the terms of their appointments hold during good behaviour, *e.g.*, the Comptroller and Auditor-General and the Charity Commissioners.

CHAPTER XX.

IMPORTANT DEPARTMENTS OF STATE.

The Foreign Secretary and his staff.—This appointment is often given to a member of the House of Lords. He is assisted by the Parliamentary Under-Secretary, who, like himself, goes out with the Government, a Permanent Under-Secretary, and three Assistant Under-Secretaries.

This great functionary conducts negotiations with foreign Powers, and is responsible for foreign policy. He recommends the appointment of ambassadors to foreign courts; he receives new ambassadors, and introduces them to the King. He hears the representations of foreign ambassadors resident in England as to their privileges and otherwise. He appoints numerous diplomatic officials, and also consuls, vice-consuls, &c. He superintends the preparation of trade statistics collected from British agents abroad, which he then has published and distributed amongst various chambers of commerce. He interviews foreign ambassadors here as to foreign affairs, and advises our ambassadors abroad. He grants passports, and often acts as the protector of British subjects abroad who have sustained injury whilst abroad. He, in concert, as a rule, with the rest of the Cabinet, carries into execution the treaty-making prerogative of the Crown, and he must accept primary responsibility for any treaty which is concluded. (As to functions of office, see Todd, vol. 2, p. 504.)

He is allowed considerable latitude as to the answering of questions put in either House, as it would be frequently inexpedient to disclose prematurely delicate negotiations with foreign Governments.

Home Office.—The powers and duties of the Home Secretary are very varied. As regards home affairs, he is the authorised channel of communication between the King and his subjects;

petitions or addresses to the King should go through the Home Secretary. He advises the Crown as to the exercise of the prerogative of mercy, which includes both pardons and commutation or reduction of criminal sentences. He can license prisoners under sentence of penal servitude, either conditionally or unconditionally, though in certain cases the licence has to be laid before Parliament. He has the general superintendence and control over prisons, criminal lunatic asylums, juvenile reformatories, and industrial schools and inebriate reformatories. The Metropolitan Police are under him, as the police authority for the Metropolitan district. He inspects the country police forces, and exercises a certain amount of control over them, and if he finds them inefficient he can advise a withdrawal of the Treasury contribution. He appoints recorders and stipendiary magistrates, and fixes the salary of magistrates' clerks. He prescribes scales of costs in criminal matters, and supervises, to some extent, the proceedings in magistrates' courts, though any misconduct on the part of a magistrate is a matter for the Lord Chancellor. Formal proceedings in the case of the bestowal of honours pass through his office. He administers the provisions of the Aliens Act and the Naturalization Acts, and he can refuse a certificate of naturalization without giving reasons. All extradition proceedings pass through the Home Office, and the Home Secretary makes the final order. Commissions from foreign courts (*commissions rogatoires*) to take evidence in England are referred by the Foreign Office to the Home Office. He administers various Acts of Parliament and has other miscellaneous duties.

War Office.—At the head of the War Department is the Secretary of State for War, who is the Minister responsible to Parliament for military matters. To assist the Parliamentary head, an Army Council was created in 1904, and its functions are particularised in an Order in Council dated August 10 in the said year; but the Secretary of State can reserve certain functions for himself.

The council consists of six members besides the War Secretary, and these are the first military member (Chief of General Staff), the second military member (Adjutant-General),

the third military member (Quartermaster-General), and the fourth military member (Master-General of Ordnance). These four members are to be answerable for the due performance of such business relating to organisation, disposition, personnel, armament, and maintenance of the Army as shall be assigned to them, or each of them, by the War Secretary.

The fifth member is called the Finance Member, who looks after monetary affairs and such other business as may be from time to time assigned to him.

The sixth member is the Civil Member, who looks after non-effective votes, and has certain other duties from time to time assigned to him. The seventh member is the Secretary of the War Office, and upon him devolves all the secretarial work of the Army Council, and he is charged with the preparation of official communications to that council, and has to see to the interior economy of the War Office, besides other duties.

The Old Admiralty.—Up to the reign of Queen Anne Admiralty work was presided over by an official called the Lord High Admiral, but since that period the office has been placed in commission (*i.e.*, Royal Commissioners were appointed to do the work of one man).

The Board of Commissioners now consists of eight persons—the First Lord of the Admiralty, four Sea Lords, one Civil Lord, a Parliamentary Secretary, and the Permanent Secretary. The First Lord, who is in the Cabinet, is responsible to Parliament for all naval matters. Though in theory merely *primus inter pares*, he is the head of the Admiralty. Each of the seven other members of the board has special duties attached to him, besides attending the board meetings.

The Parliamentary Secretary has duties analogous to those of the Under-Secretaries of State.

The Treasury and its history.—The First Lord of the Treasury is almost invariably the Premier, though Lord Salisbury was Premier without being First Lord of the Treasury. He is only, however, the titular head, because the duties of Premier are too important to allow of the efficient discharge of departmental work in addition.

In the days of the Plantagenets the present Treasury was known as the *Scaccarium* (Exchequer), and it was so named because the committee of the continual council of the King sitting for revenue purposes occupied an apartment called the *Scaccarium*.

This *Scaccarium*, or Exchequer, was divided into two departments, viz., the Upper Exchequer, or Exchequer of Account, and the Lower Exchequer, or Exchequer of Receipt. The former department "recorded and checked payments made for the service of the Sovereign and the State," and the latter "received payment of royal dues payable by local officers appointed for collection of the same" (Trail, p. 32). At the head of the *Scaccarium* was a personage called the Treasurer, who was inferior in point of rank to the Justiciar and Chancellor (as to these officials, see Carter, pp. 118 *et seq.*).

When the Chancellor became a person of weight and importance and his duties onerous, the Treasurer gradually became prominent, and in the time of Elizabeth Burleigh styled himself Lord High Treasurer.

The Treasurer had certain colleagues known as Barons of the Exchequer, and these persons probably sat at meetings of the Exchequer of Account. In the year 1612 A.D. the Treasury was placed in commission, and is in commission now, though its effective head is an official called the Chancellor of the Exchequer.

The Chancellor of the Exchequer.—We first hear of this office in the eighteenth year of Henry III., in which year "John Maunsell was appointed by writ directed to the then treasurer." "He was to reside at the Exchequer of Receipt, and to have a counter-roll of all things pertaining to the said receipt" (Trail, p. 34).

Maunsell was probably the first *Cancellarius de Scaccario*, and that office is mentioned in a later record of the reign of Henry III. (Trail, p. 34).

Present Chancellor of the Exchequer.—This official is now of necessity a Cabinet Minister. He is appointed by letters patent under the Great Seal and personal delivery of certain seals of office.

He is one of the Treasury commissioners (the commissioners for executing the offices of Treasurer of the Exchequer of Great Britain and Lord High Treasurer of Ireland); but in reality he is the chief of that department, the other commissioners having little or nothing to do with the policy of the office.

The present nominal commission consists of the First Lord of the Treasury (who has large political patronage, but does not concern himself with the work of the office; the First Lord is usually the Prime Minister), the Chancellor of the Exchequer, and three members of the Government who are not members of the Cabinet, but who go out with the Cabinet, viz., three Lords of the Treasury. For the most part their office duties are of a formal character.

It is supposed to be the chief function of the Chancellor of the Exchequer to protect the taxpayer and prevent waste in all directions, and to this end he has to overhaul the estimates of other departments, which are annually submitted to him for the purpose. When the estimates are presented, the Treasury officials cut them down to the smallest possible compass compatible with the national requirements. From these estimates thus cut down the Chancellor prepares the annual Budget, and to meet the requirements of the nation as disclosed thereby he submits to Parliament the necessary measures of taxation, either imposing new taxes or remitting old ones. The Chancellor represents all the revenue offices in Parliament (Todd, vol. 2, pp. 434 *et seq.*).

The Financial Secretary.—This official has a seat in Parliament, and his work, both at the Treasury, and in Parliament, is to master financial details and assist generally the Chancellor of the Exchequer in this respect (cf. Laws of England, vol. 7, p. 101).

The Patronage Secretary.—This gentleman is Chief Government Whip, with important Parliamentary functions; he has also extensive duties as to dispensing patronage (Todd, vol. 2, p. 592).

The Treasury Solicitor.—This functionary is generally a barrister. He is the legal adviser to the Government depart-

ments, and defends actions brought against Ministers and, in some cases, other public functionaries. He has to do with the estates of intestates when the Crown succeeds. As King's Proctor he intervenes to stop decrees nisi in divorce being made absolute in cases of collusion and other instances where it would be contrary to morality to sever the marriage bond. He can demand to see briefs, letters and other documents in divorce cases, whether the same be privileged or not.

Director of Public Prosecutions.—This office was formerly combined with the office of Solicitor to the Treasury, but the offices have been severed by the 8 Edw. VII. c. 3. Regulations made under the Prosecution of Offences Act, 1879, provide for his taking action in criminal cases which appear to be of importance or difficulty, or which from other reasons require his intervention.

Parliamentary Counsel to the Treasury.—Two barristers are appointed to this office. Their duties are to draft all Government Bills, and occasionally important Orders in Council, and also to advise on matters connected with legislation.

Public Trustee.—The Public Trustee is a State functionary empowered by statute to take over trusts of private individuals subject to certain unimportant statutory restrictions. He is a source of public convenience and of profit to the Revenue. From a Constitutional standpoint the office is of interest as affording an exception to the maxim, "The King can do no wrong," since a remedy exists against the Consolidated Fund in respect of certain torts committed by him, *e.g.*, negligence (see 6 Edw. VII. c. 55, s. 7).

Ministry of Health.—This Department was created by the Ministry of Health Act, 1919 (c. 21), to supervise the public health and to do the work formerly allotted to the Local Government Board, which has been abolished.

Its head is the Minister of Health, who has a seat in the Cabinet and is assisted by a Parliamentary Secretary. The permanent officials consist of two first secretaries and the first, being the senior, chooses under-secretaries and a clerical staff.

The functions of this department consist of (a) the former

Local Government Board work; (b) the powers and duties of the Insurance Commissioners; (c) certain functions formerly appertaining to the Education Board and relating to the health of certain women before confinement, the medical supervision of very young children, supervision of the health of children at Board schools, supervision of midwives, certain duties under the Children Act as to protection of infant life, and other matters concerning the health of the community.

Ministry of Labour.—This Department was created by the New Ministries and Secretaries Act, 1916 (c. 68). Its head is the Minister of Labour, who has a seat in the Cabinet.

There is also an Under-Secretary, with a seat in Parliament, and a Permanent Secretary, assisted by a large clerical staff. Its functions are to relieve the Board of Trade of its duties under the Labour Exchanges Act, 1909, the Conciliation Act, 1896, the National Insurance (Unemployment) Acts, 1911 to 1918. Power was also reserved for the Crown to assign to it other duties by Order in Council.

Board of Agriculture and Fisheries.—This Department was created in 1889, and its head is the Minister of Agriculture, who changes with the Government. The Ministry has charge of agriculture and fisheries, the supervision of fisheries having been transferred to its control from the Board of Trade. It guards the nation from evils incident to animal diseases. It makes regulation as to rabies of dogs, deals with stray dogs, and the muzzling and importation of dogs from abroad. It can legislate as to insects and pests. It has supervisory powers as to sale of butter and margarine. It inspects places where butter is sold, and also dairies. It supervises fresh-water fisheries. It has powers as to small-holdings and allotments. It has taken over the work of the Land Commissioners as to copyholds. It prepares statistics as to forestry and agriculture and experiments in these. It controls Kew Gardens and certain of the Crown lands. It has taken over the work of the Tithe Copyhold and Enclosure Commissioners. He has duties as to the Settled Land Acts.

Post Office.—The Post Office originated in 1643, and the first Postmaster-General is believed to have been one Prideaux, who

was also Attorney-General during the Commonwealth (Stephen, Commentary). Anson says the office was not a source of revenue till the reign of Charles II., though James I. is believed to have established a Post Office to give facilities to English merchants trading with the Continent and Charles I. to have established another Post Office for the transference of mails to and from Scotland. The present principal functions of the Post Office, are the conveyance of letters, postcards, inland telegrams, newspapers, books and parcels. It sells annuities, and carries on the business of life insurance to a limited extent; it supervises national insurance of employés. By the Telephone Act, 1911, it has taken over, to the extent provided for by the Act, the working of telephones. It also exercises numerous other functions, such as the selling of stamps for divers purposes, and, finally, it has a Savings Bank department.

Board of Trade.—The Board of Trade has had various temporary duties assigned to it connected with the late war. Owing to the numerous changes in the work of the Departments, it is increasingly difficult to describe the functions of the Board of Trade. It is nominally a board, but its effective head is the President of the Board, who changes with the Ministry, and is assisted by a Parliamentary Secretary and Permanent Secretary and a clerical staff. It is still in a state of reconstruction. In its main department it registers ships and seamen. There is a commercial department, which has duties with reference to commercial treaties and commercial intercourse with other States.

It has also inland commercial duties. It controls patents, bankruptcy proceedings, and matters connected with insolvent companies. It also supervises pilots, has duties with reference to solicitors, prepares commercial statistics, &c.

Ministry of Pensions.—This Department was created by the Ministry of Pensions Act, 1916 (c. 65), which transferred to it the functions formerly discharged in relation to pensions by the Army Council, the Admiralty, and the Commissioners of Chelsea Hospital. Its head is the Minister of Pensions, assisted by a Parliamentary Under-Secretary.

The Lord Chancellor.—As well as being a judge the Lord Chancellor is an executive official, being responsible for the use of the Great Seal. He presides in the House of Lords at the debates, and is expected to introduce important legal measures. As keeper of the King's conscience, he presents to numerous small livings. He appoints the High Court judges and appoints and dismisses County Court judges. He appoints justices of the peace on the nomination of the Lord-Lieutenant. Many judicial officers can be dismissed by him. Finally, it may be said that he is a member of the Executive and the Cabinet and that he exercises executive, judicial, and legislative functions. A Roman Catholic is not eligible for the office.

The Law Officers.—These officers are the heads of the Bar in their respective countries, and they change with the Government, and as a rule are not in the Cabinet. They consist of the Attorney- and Solicitor-General for England, and the Lord Advocate and Solicitor-General for Scotland. The English Attorney-General is appointed by letters patent under the Great Seal, and must be in the House of Commons. In civil work he represents the Crown, and in criminal proceedings he or the Solicitor-General, or their deputies, prosecute in cases of importance. He is the head of the Bar and general referee on points of etiquette. He advises the Government departments in legal cases, and he has certain judicial functions connected with committees of privilege in the Lords. His *fiat* is necessary in certain legal proceedings where the public are concerned, and he can in certain other cases intervene on behalf of the public personally or by deputy. He deals with certain matters relating to patents. The Solicitor-General is in a sense a subordinate of the Attorney-General, and frequently gives a joint opinion with the former on legal matters when required so to do by the Government departments. He usually succeeds to the post of Attorney-General when it is vacant. He changes with the Ministry, and must be a member of the Commons. His duties are similar to those of the Attorney-General, save as to one or two matters. Both the law officers are precluded from private practice during tenure of office. The Scottish law officers have analogous functions with regard to Scotland.

The Colonial Office is presided over by a Secretary of State, who is assisted by a Permanent and a Parliamentary Under-Secretary. The Secretaryship for the Colonies was separated from the War Secretaryship in 1854. The office is divided into three departments : (1) The Dominion department, which deals with self-governing colonies and the Imperial Conference when it assembles ; (2) The Crown Colony department, which deals with Crown colonies and protectorates ; and (3) the general and legal department. Colonial governors are appointed by the Crown on the recommendation of the Secretary of State, who makes judicial and executive appointments in the Crown colonies and protectorates, except in the case of minor appointments, which are made by the governor. He speaks for the colonies on all matters arising in Parliament in relation to them.

India Office.—After the Mutiny of 1857 the Government of India was transferred from the East India Company to the Crown by the Government of India Act, 1858, and the powers of the East India Company were vested in a Secretary paid out of the revenues of India. At the same time a Consultative Council was created, the majority of whom are required to be persons who have served or resided in India for at least ten years. This council is divided into committees under the direction of the Secretary of State and, with the exception of certain secret communications, all dispatches and orders of the Secretary of State must be laid before his Council. If the Secretary of State and his Council disagree he can override the Council, but must record his reasons for doing so.

Orders relating to the expenditure of the revenues of India may not be made without the concurrence of a majority of the Council present at the meeting.

Under the Council of India Act, 1911, the Council is to consist of not less than ten nor more than fourteen and their tenure of office is reduced from ten to seven years. Under the Government of India Act, 1858, the Secretary of State is a corporation sole for the purpose of suing and being sued but not of holding property.

CHAPTER XXI.

COLONIES, AND CONSTITUTIONS OF THE SELF-GOVERNING
DOMINIONS.

The term British Islands means the United Kingdom, the Channel Islands, and Isle of Man (Interpretation Act, 1889 (c. 163), s. 18 (a)).

A British possession is any part of his Majesty's dominions, exclusive of the United Kingdom (*ibid.*).

A colony is any part of his Majesty's dominions exclusive of the British Islands and British India, and the expression British India means all territories governed by his Majesty through the Governor-General of India, and India means India together with the adjacent territories under the Suzerainty of his Majesty (*ibid.*).

A British Settlement or Settled Colony means any British possession which has not been acquired by cession or conquest, and is not for the time being within the jurisdiction of a Legislature constituted otherwise than by virtue of the British Settlements Act, 1887 (c. 54).

Dominions are colonies possessing responsible government, *i.e.*, the Ministers are responsible to the Legislature of the colony in question.

(a) *The United Kingdom.*—England, Scotland, and Northern Ireland are governed in many respects by different laws, but for most constitutional purposes they form a single entity known as the United Kingdom of Great Britain and Northern Ireland. The Crown and Parliament are supreme over them all. The operation of an Act of Parliament is a good test of this constitutional doctrine. Parliament can legislate for all the dominions of the Crown, and for British subjects everywhere. But, unless a contrary intention is expressed, an Act of Parliament extends to the whole of the United Kingdom, and does not extend beyond. For example, if an Act is intended to apply to England only, the regular form of the extent clause runs: "This Act shall not extend to Scotland or Northern Ireland." It should be noted that the Irish Free State, the Channel Islands and the Isle of Man do not form part of the United Kingdom, and also that the expression "England" in an Act of Parliament includes Wales and Berwick-on-Tweed (see 20 Geo. II. c. 42, s. 3).

A Protectorate is a place outside his Majesty's dominions placed under the protection of the British Sovereign, who regulates its foreign relations. Where a protectorate at the time of protection has an adequate settled Government it is assumed the British Government allows it to legislate, subject to a veto on legislation; otherwise the protectorate is managed like a Crown colony, though the dignity of the native ruler is respected.

Protectorates are mainly regulated by the Foreign Jurisdiction Act, 1890 (b). Their affairs are administered by the Crown in a more or less paternal fashion suited to native races not far advanced in civilisation. Our control tightens or slackens according to circumstances. In many cases they are governed through native chiefs, the Crown retaining the ultimate and supreme control. The expression "protectorate" is used somewhat indefinitely. On the one hand it includes what are practically Crown colonies, whilst on the other it shades off into what is called a "sphere of influence" (*i.e.*, a place over which another country has bound itself by treaty not to exercise influence, as, for instance, in Persia before the war). A native State is also said to be within our sphere of influence when we leave its internal affairs alone, but exercise a greater or less degree of control over its foreign relations in order to protect our interests.

For further information as to protectorates and spheres of influence, see Hall's Foreign Jurisdiction of the Crown. The Crown controls the public officers who govern the protectorate. The Crown has power under the Foreign Jurisdiction Act, 1890, to legislate for protectorates by Orders in Council.

Sometimes the control of a group of protectorates is delegated to a High Commissioner, and at other times to an administrator, who is nominally assisting the native sovereign, thus preserving the dignity of the latter. Sometimes the protectorate has a Legislative Council, and occasionally its legislation is in the hands of an adjoining colony.

The main object of establishing a protectorate is to safeguard

(b) Under the Covenant of the League of Nations England is given certain protectorates to administer.

English residents and English interests therein, but in certain protectorates laws may be made affecting the natives : thus, it has been held that when a Commissioner had been appointed to do what was lawful in a protectorate for maintenance of order and good government he could detain a person—a tribal chief—in custody. Here a *habeas corpus* was applied for and the legality of the detention upheld—*R. v. Crewe ; Ex parte Segrome*, [1910] 2 K. B. 577.

Great Britain is entrusted by the League of Nations with mandatory colonies of which our King is not the sovereign, and of which the League may be the sovereign.

These territories are of three kinds—(1) Nations under Turkish rule, which will require only administrative advice and assistance till they can stand alone. (2) Certain Central African colonies which are not in such an advanced state as the first class. Here the mandatory will be responsible for administration under conditions guaranteeing freedom of religion subject to maintenance of public order, prevention of slavery, restriction of traffic in arms and liquor, and of the formation of armies and navies. (3) A third class, like certain South-West African territories, which will be administered under the laws of the mandatory subject to the safeguards above mentioned.

It will be the duty of all mandatories to furnish annual reports to the League touching their administration.

Acquisition of Colonies.—Colonies have been acquired by (i) occupancy ; (ii) conquest ; (iii) cession ; (iv) mandate.

The status of a mandatory colony is not yet very clearly defined.

(i) A *Settled Colony* is a place to which British settlers have resorted, and which at the time of settlement was either uninhabited (*e.g.*, Pitcairn Islands) or had no civilised government. The British Settlements Act, 1887 (c. 54), defines it as “ any British possession which has not been acquired by cession or conquest and is not for the time being within the jurisdiction of a legislature constituted otherwise than by virtue of this Act or any Act repealed thereby of any British possession.”

Section 2 of the Act provides that “ it shall be lawful for his

Majesty in Council to establish all such laws and institutions, and constitute such courts and officers and to make such arrangements for administration of justice as may appear expedient to his Majesty for the peace, order, and good government of his Majesty's subjects and others within the Settlement."

Section 3 empowers the Sovereign to delegate to any three or more persons within the settlement all powers of legislation by His Majesty in Council either absolutely or conditionally.

Section 4 enables the Sovereign to confer jurisdiction as to matters arising within the settlement, on any court of any other British possession.

As to settled colonies, the settlers take with them (a) the common law of England so far as the same is applicable to an infant community; (b) existing English statute law so far as the same is applicable to an infant community. The Statutes of Mortmain, for instance, would not be so applicable.

Settlers are not bound by statutes made after the foundation of the settlement unless the statute in question contains an express direction that it is to apply.

(ii) *Conquered Colonies*.—When a country is conquered the following changes take place :—

(1) The conquered territory belongs to our King and becomes subject to the legislation of the Imperial Parliament.

(2) The conquered inhabitants become our King's subjects and cease to be alien enemies.

(3) The laws of the conquered colony continue to exist till altered by the conqueror so far as they are consonant with our principles of right and justice, and if there are no laws those entrusted with the management of the colony must govern in accordance with right and justice. When a country has been conquered all laws connected with allegiance to the former Sovereign cease, and also all laws relating to the administration of the law in its original and appellate jurisdictions, and, in addition, all laws connected with the exercise of the sovereign authority (Broom's Constitutional Law, 2nd ed., p. 49).

(4) Royal ordinances are subordinate to the Parliament of Great Britain.

In the case of *R. v. Picton*, 30 St. Tr. 225, the court held that

torture allowed by the law of Spain could not be permitted in a British colony taken from the Spaniards.

When the King grants a Legislature to a conquered or ceded colony his power of legislation by Order in Council ceases unless his power so to legislate has been reserved (*Campbell v. Hall* (1774), 20 St. Tr. 239-354, 1387; Thomas, 69).

(iii) *Ceded Colonies*.—There is no practical difference between a ceded colony and a conquered colony except this, that the treaty of cession may perhaps place the inhabitants in a better position than if they had been conquered.

(iv) As to *Mandatory Colonies*, see *ante*, p. 199. They are colonies placed or to be placed under English protection either by the League of Nations or a treaty, the terms of which will have to be observed.

Classification of colonies.—From a different standpoint colonies may be classified as follows : (a) Those not possessing responsible government. (b) Those possessing responsible government. Class (a) may be sub-divided into (i) colonies possessing an elected house of assembly and a Crown-nominated legislative council, *e.g.*, Bahamas, Barbadoes, Bermuda (Colonial Office List, 1918, p. 719); (ii) colonies possessing a partly elected legislative council, the constitution of which does not provide for an official majority, *e.g.*, British Guiana, Cyprus (*ibid.*); (iii) colonies possessing a partly elected legislative council, the constitution of which provides for an official majority, *e.g.*, Fiji, Jamaica, Leeward Islands, Malta, Mauritius (*ibid.*); (iv) colonies and protectorates possessing a Crown-nominated legislative council, *e.g.*, British Honduras, Ceylon, East African Protectorate, Falkland Islands, Gambia, Gold Coast, Grenada, Hong Kong, Nyassaland Protectorate, St. Lucia, St. Vincent, Seychelles, Sierra Leone, South Nigeria, Straits Settlements, Trinidad. In all the above except British Honduras the Crown provides for an official majority. The legislative councils of Gambia, Sierra Leone and Southern Nigeria have power respectively to legislate for the Gambia Protectorate, Sierra Leone Protectorate, and South Nigeria Protectorate; (v) colonies and protectorates without a legislative council, *e.g.*, Ashanti, Basutoland, Bechuana-land Protectorate, Gibraltar, North Nigeria, Northern Territories

of the Gold Coast, St. Helena, Somaliland, Swaziland, Uganda, and Islands in the Western Pacific. In all these colonies and protectorates the Crown can legislate by Order in Council with the exception of British Honduras and the Leeward Islands (*ibid.*).

The Crown can legislate for colonies with non-representative assemblies, *i.e.*, assemblies in which, whether they are partly elective or otherwise, the Crown can secure half of the votes.

The Imperial Parliament can tax any colony, but it is inexpedient, as well as unconstitutional, to do so. What would be done if our colonies became federal States is at present difficult to forecast. Where there is an elective representative legislature in a colony the tendency is gradually to give it responsible government, as is being done in India. The governor would, in such a case, be given instructions to develop any germs of a party system existing in the colony, and responsible government might follow if this experiment were successful.

(b) *Self-governing Colonies.*—In all these colonies there is a governor-general or, at any rate, a governor, who acts more or less as a constitutional sovereign, and there are also, as a rule, two legislative chambers. The Executive is, moreover, selected by the predominating party in the lower house.

The legislative powers of a self-governing colony, though controllable by the Imperial Parliament, are unrestricted within their areas (*Powell v. Apollo Candle Co.* (1885), 10 A. C. 282).

In *Riel v. Regina*, 10 App. Cas. 675, the Judicial Committee of the Privy Council held that they would not grant leave to appeal in any criminal case except where the requirements of justice were very clearly departed from, and that the trial of a man for treason before two magistrates and a jury of six men was not such a departure. The court also held that 34 & 35 Vict. c. 38, which authorised the Dominion Government of Canada to provide for the administration, peace, order and good government of any territory not for the time being within any Canadian province, gave to the Dominion Parliament the widest discretion to effect those objects, and that 43 Vict. c. 25 (a Canadian statute) which prescribed a definite procedure for

the trial of criminal cases (impliedly including treason) was not *ultra vires*.

All self-governing colonies can legislate for the peace, order and good government of the colony, but extra-territorial legislation is not, as a rule, conceded.

In the case of *Macleod v. Att.-Gen. for New South Wales*, [1891] A. C. 455, the appellant had committed bigamy in the United States. The New South Wales Criminal Law Amendment Act, 1883, punished bigamy, wherever committed, with penal servitude; but the Privy Council (Judicial Committee) held that the Act above mentioned was *ultra vires* so far as concerned legislation against bigamy committed outside the territorial limits of the legislating body. But where extra-territorial legislation is passed the Privy Council, as far as possible, acts on the maxim *Ut res magis valeat quam pereat*, and gives to the colonial enactment an extra-territorial application whenever it can. In *Att.-Gen. v. Cain* the Privy Council held that a Canadian Act which impliedly authorised the personal restraint of an alien immigrant into the Dominion outside the territorial limits for the purpose of returning him to the country from which he came was not *ultra vires* (*Att.-Gen. for Canada v. Cain*, [1906] A. C. 542). Again, in the case of *Peninsular and Oriental Company v. Kingston*, [1903] A. C. 471, it was held impliedly that a colonial Act may have an extra-territorial application and that the breaking of Custom House seals on the high seas was punishable within the limits of the colony.

In *Tilonko v. Att.-Gen. of Natal*, [1907] A. C. 93, it was held that an English court could not enter into the propriety, as opposed to the legal validity, of a colonial statute.

Colonial governor.—Every colony has a head—its governor, administrator, high commissioner, or governor-general—and with this office is united that of commander-in-chief of the military forces.

All colonial bills before they become statutes must receive the governor's assent. The governor has, as a rule, a discretion as to assenting to bills, but as to certain bills he is required by his commission or instructions to reserve them for the signification

of his Majesty's pleasure, or assent to them only where they contain a clause suspending their operation until they are confirmed by the Crown, *e.g.*, bills which might militate against Imperial interests (such as bills restraining immigration of certain aliens, which were for a long time vetoed).

It may be said that in a colony with responsible government the governor is the connecting link between the Crown and the colony. As regards internal administration, he is a constitutional sovereign, so far as a man can be called a sovereign who has to take orders from political superiors. In such administration, he interferes but little, if at all.

But directly the interests of the Mother Country are involved, he must see that they sustain no detriment, and he may have to act in opposition to his ministers by vetoing an Act (Todd, *Parliamentary Government in the Colonies*, 2nd ed., p. 806).

As to his personal position, the colonial governor is hardly a sovereign, unless perhaps he be a viceroy. He can, it seems, commit in his official capacity certain wrongs with impunity for which ordinary governors could be penalised (*Luby v. Lord Wodehouse* (1865), 17 Ir. C. L. 618; *Sullivan v. Lord Spencer* (6 Ir. C. L. 173); and *Tandy v. Lord Westmorland* (27 St. Tr. 1246), cited and critically commented on in *Musgrave v. Pulido* (1879), 5 App. Cas. 111).

With governors other than governors of self-governing colonies the case is somewhat different. Though they more resemble autocrats than constitutional sovereigns, they can be tried in England under the joint operation of the Governors Act of William III. (c) and 42 Geo. III. c. 85, for an official crime committed in the colony. In 1802 Governor Wall was tried at the Old Bailey, convicted, sentenced and executed for causing the death of one Benjamin Armstrong by the infliction of excessive corporal punishment.

In *R. v. Picton* (*supra*) Governor Picton was tried at the Old Bailey for torturing Luisa Calderon, the law of Spain, which partly prevailed in the colony, permitting torture.

(c) Probably these Acts extend to all kinds of governors.

He was tried twice, but not found guilty, and the prosecution was dropped.

In *R. v. Eyre* (L. R. 3 Q. B. 487) it was held that where a colonial governor has been found guilty of crime in his official capacity, the Court of King's Bench, either upon information by the Attorney-General, or indictment found by the grand jury, may try such crime, and such crime may be said to have been committed in Middlesex. It was also held that the magistrate could examine Mr. Eyre and commit him for trial.

In *Phillips v. Eyre* (1867), L. R. 4 Q. B. 225; Thomas 89, a civil case, it was held : (1) That where a colonial legislature with plenary powers has been established in an English colony the comity of nations is to apply to its legislation; (2) that a colonial governor could legally assent to a bill in which he is personally interested, *c.g.*, a bill of indemnity for official acts.

In *Musgrave v. Pulido* (1879), 5 App. Cas. 102; Thomas, 92, the governor was sued for damages respecting the detention of a vessel. He pleaded that what he did was an act of State (*cf. Buron v. Denman* (1859), 2 Ex. Rep. 167). The court held that a colonial tribunal could try the question whether a given official act of a governor was or was not an act of State ((1880), 5 App. Cas. 102; Thomas, 92).

In *Hill v. Bigge* it was held that a colonial court could try an action of debt to which the governor was a party ((1841), 3 Moo. P. C. C. 465; Thomas, 88), but that the person of the governor cannot be attached in a civil court whilst he is acting as governor (*ibid.*).

In *Mostyn v. Fabrigas* a petition of an alleged mutinous character was presented to the Governor of Minorca by one Fabrigas and was followed up by imprisonment, and it was held that the Court of King's Bench in England could entertain an action of tort committed by a colonial governor in a colony (1 Sm. L. C. 591; Thomas, 87).

In *Cameron v. Kyte* it was held that a governor has not *virtute officii* a delegated authority to do any act unauthorised by his commission or the accompanying instructions (Broom, Constitutional Law, p. 64).

Status of governors.—They are appointed under the Royal Sign Manual, and represent the Crown in their colonies. The extent of their powers and duties varies with the constitution of the colony. In self-governing colonies they are, as has been said above, practically constitutional sovereigns acting on the advice of responsible Ministers, whilst in Crown colonies of the strict type they are practically autocrats who, subject to the control of the Colonial Office, exercise legislative and executive powers.

Subject to any modification introduced by the constitution of the colony, the status of the governor may be described as follows :—

He is entitled to obedience and assistance from all civil and military officers. He has no authority over his Majesty's ships, and if he requires their assistance he must communicate first with the Colonial Office, unless the lives of British subjects be in urgent danger, when he may practically order the Navy to assist.

He exercises the prerogative of mercy and issues warrants for the expenditure of public money. He appoints and dismisses public servants, including judges, the latter having a right of appeal as a rule to the judicial committee. He assents to or withholds assent from bills, if there be a legislative body, or in certain cases reserves bills for the assent of the Crown at home. He must not leave the colony without his Majesty's permission (Colonial Regulations, s. 2, published in Colonial Office List, 1921).

Alteration of constitutions.—Not only all self-governing colonies, but also all colonies with representative legislatures can, if these are constituent assemblies, alter their constitutions. A constituent assembly is a body within a country which can alter the constitution of that country.

When a constitutional law is altered the machinery directed by the Constitution must be employed, *c.g.*, where a second legislature, or, rather, extraordinary legislature, has to be created for the purpose, any alteration of the Constitution is null and void unless effected by such extraordinary legislature. Most federal States have two such legislatures, and a strictly federal system demands them for the protection of State interests.

The Dominion Government of Canada is not a constituent assembly.

The Colonial Laws Validity Act, 1865, s. 2, provides that a colonial law which is in any way repugnant to any Imperial statute applying to the colony to which such law may relate, or repugnant to any order or regulation made under any such statute, or having in the colony the force and effect of such statute, shall not be void altogether, but shall be read subject to such statute, order, or regulation, and shall only be void to the extent of the repugnancy.

Section 3. No colonial law shall be deemed to be void on the ground of repugnancy to English law unless the same be repugnant to such statute, order, or regulation as aforesaid.

Section 4. No colonial law passed with the concurrence of, or assented to by, the governor of any colony shall be void by reason only of instructions with reference to such law or the subject thereof which may have been given to the governor by, or on behalf of, his Majesty by any instrument other than the Letters Patent or instrument authorising such governor to concur in passing, or to assent to, laws for the peace, order, or good government of such colony, even though instructions may be referred to in such Letters Patent or last-mentioned instrument.

Section 5. Every colonial legislature shall be deemed at all times to have had full power within its jurisdiction to establish courts of justice and to abolish and reconstitute such courts, and to alter the constitution thereof, and to provide for administration of justice therein, and every representative legislature shall be deemed at all times to have had power to make laws respecting the constitution, powers, and procedure of such legislature, provided that such laws have been passed in such manner and form as may from time to time be required by any statute, Letters Patent, Order in Council, or colonial law for the time being in force in the said colony.

Privileges of colonial legislatures.—Unless (1) The statute of the Imperial Parliament which confers upon it a constitution confers upon it the full privileges of the Imperial Parliament, or (2) it has adopted by statute the privileges of the British

House of Commons, a colonial legislature has only limited privileges.

It can protect the assembly from disorder, but it is unable to punish disorderly persons. The point arose in the case of *Kielley v. Carson* (1884), 4 Moo. P. C. 63, where it was held that a legislative assembly *did not possess as a legal right the power of arrest prior to adjudicating on a contempt outside the House, but only such powers as were reasonably necessary for the proper exercise of its functions and duties as a local legislature.*

In *Barton v. Taylor* (1886), 11 App. Cas. 197, it was held that punitive action was not justified, neither was the unconditional suspension of a member during the pleasure of the House, but that he could only be suspended during the sitting; and in *Doyle v. Falconer* (1866), 4 Moo. P. C. (N. S.) 203 it was held that a member could not be committed to prison merely for disorderly conduct in a colonial legislative assembly.

In the case of certain dominions of the Crown, Imperial statutes have expressly provided that such dominions may, in their own legislatures, pass statutes conferring on themselves the privileges of the English House of Commons.

The Colonial Laws Validity Act, by section 5, confers the like indulgence on every representative legislature, but express statutes have been passed notwithstanding this section of the Colonial Laws Validity Act (cf. the Australian Commonwealth Act).

In *Dill v. Murphy* (1864), Moo. P. C. (N. S.) 487, an old case arising under an old Act authorising the Victoria Parliament to adopt the English House of Commons privileges, the commitment of a man for contempt for publishing a libel on a member of the Victoria Legislature was allowed. In the important case of *Speaker of Victorian Legislative Assembly v. Glass* (1871), L. R. 3 P. C. 560, it was held that where an Imperial statute had given to the Victorian Legislature legislative power to pass a statute conferring on itself the privileges of the English House of Commons it was competent for the Victorian Assembly to commit a man for contempt under a warrant which did not specify the grounds of commitment, and that the Supreme Court of Victoria had acted illegally in releas-

ing Glass from custody. Special leave to appeal was granted though the captive had been released, on the ground that the case being one of public interest the opinion of the Judicial Committee would be a valuable precedent.

Treaties.—Before the war the colonies could not, as a general rule, conclude treaties without the consent of the Imperial Government, though, as a matter of policy, such consent was rarely withheld. The war has altered this position, and it is a noteworthy fact that not only were colonial delegates consulted as to the recent Treaty of Versailles, but they were actually signatories of that treaty.

Up till very recently the colonies were consulted as to treaties made by the Imperial Government and their wishes were studied, but the Home Government reserved to itself full freedom of action, especially in cases where Imperial interests were vitally concerned, as in the recent Treaty of Peace.

As a rule, it has been the custom for the Colonial Secretary to negotiate direct with foreign nations through agents of the Home Government. This rule, however, was occasionally departed from and Canada has been allowed to negotiate treaties from beginning to end with Indian chiefs, and also with the United States where Canadian interests only were involved.

Appeals from the colonies to the Privy Council.—From the days of Henry VII. all appeals from the colonies, or plantations, as they were then called, lay to the King in Council, and these appeals were heard in the Star Chamber, which may or may not have been a Committee of the Privy Council (*d*).

The statute which abolished the Star Chamber in 1641 did not do away with colonial appeals, which continued to be heard by the King in Council, in virtue of the royal prerogative.

In *Fryer v. Bernard* (1734), Peere Williams, it was laid down by Lord Macclesfield that “appeals from the courts in the plantations lay to the King in Council alone.”

The prerogative right still remains, but has to a certain extent

(*d*) There has been much academic discussion as to whether this Court was a Committee of the Privy Council or a distinct Court. Maitland says it was a Committee of the Privy Council (Constitutional History, p. 460).

been restricted by statutes. The Sovereign can hear appeals from superior as well as inferior courts in the colonies and the right of the Crown to hear these appeals cannot be taken away save by express words. Thus, in the case of *Cushing v. Dupuy* (1880), 5 App. Cas. 409, where the Canadian Insolvent Act provided that the judgment of the court shall be final, it was held that an appeal still lay to the King in Council.

Criminal appeals are not, as a rule, encouraged by the Judicial Committee, nor are civil appeals unless the case is of great importance, or property of a considerable amount is affected, or the issue vitally affects the public interest (*Prince v. Gagnon* (1882), 8 App. Cas. 103), and this principle is applied throughout all our colonies.

Appeals to the Privy Council are either: (1) Appeals as of right; (2) Appeals by leave of the court appealed from; (3) Appeals by special leave.

"It is a general rule of law that an appeal to the King in Council does not lie as of right unless given by express enactment or express grant" (Safford and Wheeler's Privy Council Practice, 1st ed., p. 710).

Appeals by special leave.—Where no appeal lies as of right, or in pursuance of leave given by the court *a quo*, a petition must be addressed to the Crown in Council for special leave to appeal. Such leave will not in general be granted "save where the case is of gravity involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character" (*Prince v. Gagnon* (1882), 8 App. Cas. 103); and will not necessarily be granted even then, *e.g.*, if the judgment sought to be appealed from is plainly right, or unattended with sufficient doubt to justify an appeal (*La Cité de Montreal v. Les Ecclésiastiques du Séminaire de St. Sulpice*, 14 App. Cas., at p. 662, and *Daily Telegraph v. M'Laughlin*, [1904] A. C. 776). In any case, special leave will not be granted where the prerogative to hear appeals has been parted with (*R. v. Bertrand* (1867), L. R. 1 P. C. 520).

In criminal cases the Judicial Committee will not give leave to appeal unless there has been a gross miscarriage of justice

(*Ex parte Deeming*, [1892] A. C. 422) or where issues of importance are involved (*R. v. Bertrand* (1867), L. R. 1 P. C. 520).

Where the court below does not possess the power to grant leave to appeal the appellant can petition the King in Council for leave to appeal (*Safford & Wheeler*, p. 738).

Whatever the amount in dispute, an appeal to the Privy Council will generally be allowed where the rights of a colonial legislative assembly are involved (*Speaker of Victoria v. Glass*, *supra*).

It should be noted that the King can hear appeals from inferior courts, but leave will as a rule be refused where there is a competent court on the spot able to deal with the case. Appeals will probably be refused where appellant has chosen the Supreme Court as his forum of appeal (*Halsbury*, vol. 10, p. 583).

Colonial judges.—Colonial judges in colonies which are not self-governing are appointed by Letters Patent under the Royal Sign Manual. They hold office during good behaviour and they are dismissible by the governor acting in conjunction with his council, but they can appeal to the Judicial Committee (22 Geo. III., c. 76, ss. 2 and 3, and Todd's Parliamentary Government in the Colonies, 2nd ed., pp. 827 and 829).

In self-governing colonies a statute frequently provides that judges are to be removable on an address from both Houses to the governor. "All legislative assemblies have a right to petition the Crown as to removal of a judge" (Todd, 2nd ed., p. 19).

Statutes binding on the colonies.—No statute binds the colonies unless it expressly states that it is to bind them.

Colonial Constitutions.

Canada.—Canada enjoys responsible government, but the Upper House, unlike that of America, is Crown-nominated (e),

(e) The place of a senator shall be vacant (1) if for two consecutive sessions he fails to attend in the Senate; (2) if he takes an oath or makes a declaration or acknowledgment of allegiance, obedience, or adherence to a foreign Power, or does any act whereby he becomes a subject or citizen of, or entitled to the rights of a subject or a citizen of, a foreign Power; (3) if he becomes a bank-

members holding for life; and the chief executive officer is a Governor-General appointed by the Crown.

Like the United States, Canada possesses a written Constitution, but, unlike the United States, her senators hold for life; whilst United States Senators hold office for six years, one-third retiring at the end of two years.

Unlike the United States and Australia and South Africa, the Canadian Constitution does not provide for a constituent assembly, an Imperial statute being necessary for change of fundamental or constitutional laws.

The Canadian Constitution was created by, and rests mainly on, the British North America Act, 1867, as amended by the British North America Acts, 1871 and 1886.

By the first Act the provinces of Ontario, Quebec, Nova Scotia and New Brunswick were united under the name of the Dominion Government of Canada. Two other Acts provided for the addition of six senators for British Columbia, six for Alberta, and six for Saskatchewan.

The Lower House, known as the House of Commons, is elected on a basis of population, as in the United States of America.

Every senator must be over thirty, a born or naturalized subject of the King, a resident in the province for which he is chosen; he must also possess a property qualification. In the choice of senators the Governor-General must act on the advice of his responsible ministers, who represent more or less the predominating party in power in the House of Commons at the time he is nominated. The House of Commons is elected by the people for four years. The numbers of the House have been altered from time to time on the basis of population (*f*).

By the British North America Act, 1875, the Canadian Parlia-

rupt or insolvent or is attainted of treason-felony or other infamous crime; (4) if he becomes non-resident in the Province of which he is a representative.

(*f*) *Conflicts between the two Houses of the Legislature.*—The only remedy is, as is the case also with the Imperial Parliament, to appoint sufficient senators to overcome opposition to the Canadian House of Commons. By virtue of s. 26 of the 1867 Act as amended, from four to eight senators may be appointed in the event of a deadlock. It remains to be seen whether the British Parliament would think it politic to wreck the career of a popular Ministry by refusing them reasonable legislative powers. No crisis has hitherto arisen.

ment has adopted the privileges of the Imperial House of Commons.

The Canadian House of Commons now consists of over two hundred members.

The Executive Government is carried on by the Governor and his acting Privy Councillors, which consists of the eighteen departmental heads and certain other Privy Councillors without portfolios. There are also honorary Privy Councillors, who are not consulted as in England.

Money bills must originate in the Commons, and no money bill, as in England, can be valid save on the recommendation of the Governor-General.

Section 55 : When a bill is presented to the Governor for his assent he must declare whether he assents (g) or dissents or reserves it for the King's pleasure. A reserved bill has no effect unless within two years from presentation to the Governor for assent it has received assent of the King in Council.

The Provinces.—These are presided over by Lieutenant-Governors appointed by the Governor-General. The provinces possess responsible Legislatures, and these Legislatures, being also constituent assemblies, can change their Constitutions. They may not, however, interfere with the functions of the Lieutenant-Governor. Two of the provinces have bi-cameral Legislatures, the rest uni-cameral.

Powers of Provincial and Dominion Legislatures.—The Provinces are, by section 92 of the Act, empowered to legislate exclusively on sixteen specific topics of a local nature enumerated in that section. Section 91 enumerates other specific topics in respect of which the Dominion is to have exclusive legislative jurisdiction. These two enumerations to some extent overlap, and when this occurs Dominion Acts, falling strictly within one of the heads enumerated in section 91, prevail over

(g) Where the Governor-General assents to a Bill he shall as soon as possible send a copy thereof to one of His Majesty's Secretaries of State, and then, if His Majesty in Council within two years thinks fit to disallow such Bill, and the Governor-General signifies such disallowance to each of the Houses of the Legislature or issues a proclamation as to such disallowance, the Act shall be void as from the date of the disallowance.

corresponding Provincial Acts, notwithstanding that the subject-matter may to a greater or lesser extent fall also within one of the enumerated heads of section 92. As to topics falling within neither enumeration, the Dominion has exclusive powers of legislation under its general authority to make laws for the peace, order and good government of Canada: but a Dominion Act resting on this power will be overridden by a Provincial Act if the Provincial Act rests on one of the enumerated heads of section 92.

The fact that the undefined residue of legislative power is vested in the central authority and not in the units is an idiosyncrasy of the Canadian Constitution, distinguishing it from America, Australia, and other federal States. It has, indeed, been said that this peculiarity excludes Canada from the class of federations proper.

General Remarks.—The Dominion Government is, theoretically at least, more under the control of the Imperial Parliament than the Commonwealth of Australia; but for all practical purposes this subjection is more imaginary than real, because the Imperial Parliament is conventionally bound to make reasonable alterations in the Constitution when requested, though there may be delay should the British Legislature not be in session. On the other hand, the Dominion of Canada is less subject to the Imperial Parliament than the Commonwealth, because the Provinces of the Dominion are less directly connected with the Imperial Parliament than are the States of the Commonwealth (cf. Dicey, p. 537). Canada is federal only in name, as before stated, on account of the formidable powers possessed by the Federal Parliament, and the Federal Government is in a position to put considerable pressure on the Provinces. The Federal Government can veto a State law within a year after its being sent up by the Lieutenant-Governor for consideration (cf. Dicey, p. 537; Kennedy, *Constitution of Canada*, p. 415). The Federal Government appoints and dismisses the Lieutenant-Governors of the Provinces and also the judges of the Provincial Superior Courts. The Australian Commonwealth can only legislate on topics fixed by the Constitution, whereas the Canadian Government can legislate on any topic not specifically allotted to the

Provinces. The proximity of the United States and the increase in power of Japan combine to increase the desire of Canadians for a strong central Government.

Finally, there is no really satisfactory way for dealing with deadlocks and no referendum.

Judicature.—By a Canadian Act of 1875 (38 Vict. c. 11), there were established a court of common law and equity, with appellate jurisdiction, called the Supreme Court of Canada, and also the Exchequer Court of Canada. The judges of these courts are appointed by the Sovereign by Letters Patent under the Great Seal of Canada, hold office during good behaviour, and are removable by an address to the Governor-General from both Houses (sections 4, 5). “All the provinces can appeal to the Privy Council without going through the Supreme Court of Canada” (Wheeler, *Confederation Law of Canada*, p. 396).

Australia.—It is worthy of note that the Constitution of Australia, as framed by the Commonwealth of Australia Constitution Act, 1900, partakes of the characteristics of both a flexible and a rigid Constitution. It is rigid in so far as the exigencies of the notion of a federation require, but flexible in so far as the traditional British dislike of unyielding forms has found expression in well-understood conventions. The key to the proper understanding of the somewhat anomalous Australian Constitution is to be found in the fact that, for the first time in history, the endeavour has been made to harmonise the conception of a federal constitution with one that is essentially opposed to it—the monarchical or unitarian. Thus stated in terms, the endeavour would seem to be necessarily foredoomed to failure; but when it is realised that the relations of the Mother Country and the largest of her self-governing colonies are really unlike anything in the history of the world, and that the framers of the Constitution have ignored the forms and taken merely those of the conventions of our Constitution which truly represent the spirit and the actual facts, it may not unfairly be thought that the Act will effect its purpose. The chief features of the Constitution of the Australian Commonwealth are these: the

government is avowedly federal in form, the federal or national Legislature having power to legislate on certain topics only, while the separate States have apparently unlimited power to legislate on the residuum of subjects (*h*); the composition of the Houses is such as to ensure, to a certain extent, the immunity of the Senate from the vicissitudes of popular feeling; for whereas the House of Representatives represents the mere numerical majority, the Senate represents the individual States in an equal proportion, *i.e.*, each State is entitled to an equal number of senators (63 & 64 Vict. c. 12, s. 9 (7)). The senators, however, are elected for a longer term, *viz.*, six years, whereas the House of Representatives can never exist for more than three years (*i*).

The federal executive is a Council to advise the Governor-General chosen and summoned by him, sworn as Executive Councillors, and holding office during his pleasure (section 9 (6)). The Ministers of State also hold office during the pleasure of the Governor-General; they must be members of the Federal Executive Council, and after the first general election no Minister may hold office for a longer period than three months, unless he is or becomes a senator or a member of the House of Representatives (*k*).

We may safely regard this executive as a parliamentary cabinet responsible to the Federal Parliament and to temporary majorities, as in England. It can dissolve Parliament (in effect) and so appeal to the electors from the authors of its own being. In the United States the administration of affairs rests with an elected President, *i.e.*, a non-parliamentary executive; in Switzerland, with an executive elected by the Federal Parliament, which cannot, however, be dismissed by its electors. This com-

(*h*) It should be noted here that whereas the Federal Government of the United States of America can legislate on only some eighteen topics, that of Australia can legislate on forty-two, ranging from such general matters as "external affairs" to such detail as "invalid and old age pensions."

(*i*) It may be here remarked, Professor Dicey observes, that though the above-noted sections of the Constitution Act would seem intended to secure a conservative element in the Senate, that body has so far shown itself "absolutely hostile to the maintenance of State rights, and far more so than the House of Representatives."

(*k*) This is in accordance with the spirit of our own Constitution, although an exception was once made in the case of Mr. Gladstone.

promise brings out strongly the cabinet traditions with which the framers of the Commonwealth of Australia Constitution Act are so familiar. The Constitution of the Commonwealth is, in reality, as flexible as that of England, notwithstanding its federal form; for though strictly the Federal Parliament cannot alter it fundamentally, yet so wide is the range of topics or "articles" about which it can legislate that, apart from the seemingly efficient means of amendment, there is but little of fundamental importance upon which it cannot legislate. The actual machinery of amendment is a process indicative of a compromise between the principle that a measure passed by both Houses represents the will of the people and the principle of the referendum. Any measure altering the Constitution must be passed by an absolute majority of both Houses and then submitted to the electors for their ratification. Presumably the Law Courts are the guardians of the Constitution as the Courts are in the United States of America.

There is to be no alteration diminishing the proportionate representation of any State in either House of the Legislature or as to the minimum representation of a State in the House of Representatives, or in any way altering the limits of a State or affecting its Constitution, unless a majority of the electorate approve the proposed law.

Admission of new States.—The Federal Parliament may admit new States to the Commonwealth on such conditions as it thinks fit and arrange for their representation in the Federal Parliament.

Original States Constitutions.—The Constitution of each original State is to continue in force until altered in accord with the manner prescribed by the Act (section 106), and all State laws in force at the time of the Union are to continue in force and may be altered and repealed by the State Legislatures (section 108). When a State law not in existence at the time of the Union is inconsistent with a Commonwealth law the latter shall prevail, but the State shall only be invalid to the extent of the repugnancy (section 109).

In one way, of course, the Constitution of Australia must necessarily be different from that of any other federation, in that it must in express terms maintain the relation of the Common-

wealth with the United Kingdom. Whether the Act expands and deepens the feeling of Australian nationality at the expense of the tie with the Mother Country is a matter which time alone can show.

The Act itself requires that no bill, whether an ordinary one or one that alters the Constitution, can become law unless it receives the assent of the Crown. Moreover, an Imperial Act can, in express terms, bind the Commonwealth (Colonial Laws Validity Act, 1865).

In short, the sovereignty of the Imperial Parliament is maintained in its integrity.

The Legislature consists of the King, represented by the Governor-General, an Upper House called the Senate (six for each of the States) the members whereof are elected for six years, and the House of Representatives, consisting of twice the Senate's number, elected on a basis of population for three years.

The Commonwealth Parliament can legislate as regards forty-two topics, whilst the State Legislatures have a supposed free hand as to other topics, and the Federal Government cannot nullify State legislation.

Every member of either House may resign on giving notice of his intention. He must be a natural-born subject of the King or else a naturalized subject for five years, and he must be of full age.

Six is to be the minimum number of senators in every original State of the Union—namely, New South Wales, Victoria, South Australia, Queensland, Western Australia, and Tasmania. The Federal Parliament can legislate as to the mode of choosing senators.

The qualifications for membership of the Senate and House of Assembly are identical, and a member of either House forfeits his seat if he is absent from his post for two consecutive months in each session. No person is eligible for either House unless he has been resident in the Commonwealth for three years and is in addition a natural-born subject of His Majesty. The following are not eligible for the Commonwealth Parliament: (1) Persons owing allegiance to a foreign State; (2) persons who have been convicted of crime punishable by imprisonment for twelve months

or longer; (3) undischarged bankrupts and also insolvents; (4) holders of office under the Crown in the Commonwealth, or those in receipt of Commonwealth pensions or having direct or indirect pecuniary interest in a Government contract.

Money Bills.—These are to originate in the House of Representatives, and no money bill is to be voted save on the recommendation of the Governor-General.

Deadlocks.—If the Lower House passes a Bill and the Senate rejects it or fails to pass same, or passes it with amendments to which the Lower House cannot agree; and then if after three months have elapsed the Lower House in the same or following session passes the proposed law, with or without any such amendments as aforesaid, the Governor-General may dissolve both Houses simultaneously, but such dissolution shall not take place within six months prior to the date of the expiration of the Lower House by effluxion of time. If, again, after the dissolution the Lower House again passes the Bill, with or without such amendments as aforesaid, and the Upper House fails to pass it, or passes it subject to amendments to which the Lower House cannot agree, the Governor-General may convene a joint sitting of both Houses and then the matter is to be disposed of by a majority sitting in joint session.

Royal Assent.—When a Bill passed by both Houses is presented to the Governor-General for the royal assent he is to declare either his assent, his dissent, or whether he reserves the Bill for the royal pleasure (section 57). The Governor-General possesses a power which the King does not exercise, in that the former may return to the House where the measure originated any proposed law presented to him, forwarding therewith any amendments he may recommend, and the Houses may then deal with such amendments. It is the duty of the Governor-General to return a Bill for further consideration where Imperial interests are threatened, but on most, if not all, other occasions he must act on the advice of his Ministers, and this course must be pursued in Canada and South Africa.

The King may disallow any law within one year from the Governor-General's assent, and on such disallowance being

notified by the Governor-General by speech or message to each House or by proclamation, the law is annulled.

No law reserved for the Royal pleasure shall have any force unless within two years from the date on which it was presented for the royal assent the Governor-General makes known by speech or message or proclamation that it has received the royal assent.

Miscellaneous provisions.—The Commonwealth Government shall protect any State against invasion, and on the application of the State Executive against domestic violence (section 64).

Military service.—Since the Union a federal law has rendered military service compulsory, all citizens having to undergo a course of training.

The Franchise.—Since the Commonwealth Act was passed women over twenty-one have been allowed to vote for members of the House of Representatives in the federal Parliament.

Judicature.—The judicial power of the Australian Commonwealth is vested in a federal court called the High Court of Australia and in such other federal courts as the Parliament creates. The High Court consists of a chief justice and other judges, not less than two in number. These judges are appointed by the Governor-General in Council, and are to be removed only by the Governor-General in Council on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity (Australian Commonwealth Act, 1900, ss. 71, 72).

The High Court has, subject to regulations made from time to time by the Australian Parliament, a right to hear appeals from the courts of the States, from the judges of the Supreme Court exercising original jurisdiction, and as to points of law from the Inter-state Commission, and the judgment of the High Court shall in all such cases be conclusive (section 73). But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the King in Council (section 73).

No appeal shall be permitted to the King in Council from a

decision of the High Court upon any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* " of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by the King in Council " (section 74). The High Court may so certify at their discretion, and thereupon an appeal shall lie to the King in Council without further leave (section 74). Except as provided in this section, this Constitution shall not impair any right which the King may have by virtue of his prerogative to grant special leave of appeal from the High Court to the King in Council. The Commonwealth Parliament may make laws limiting the matters in which leave to appeal may be asked, but proposed laws containing any such limitations shall be reserved by the Governor-General for the King's pleasure (section 74).

The probability is that, with the exception of the cases mentioned in section 74, there is a concurrent right of appeal from the provincial courts to the Privy Council. The Judiciary Act [of the Commonwealth], 1903, s. 39, has restricted in certain cases the right of appeal to the King in Council (Tarring's *Law relating to Colonies*, 4th ed., p. 158).

In the case of *Webb v. Outrim*, [1907] A. C. 81, it was held by the Judicial Committee that the Australian Parliament could not under its Constitution take away the right of appeal to the King in Council from a judgment of the Supreme Court of Victoria as to the validity of the income tax of a Commonwealth officer in respect of his salary, or apparently from any judgment of the States Supreme Courts (Tarring, p. 158).

The question as to the concurrent right of appeal is, on the whole, a somewhat doubtful point.

South Africa.—*South Africa Act*, 1909.—The Constitution evolved by this Act is formed on the Canadian pattern, as laid down in the *British North America Act*, 1867, and not on that of the United States of America. The conditions in South Africa at the time of the Act were, however, quite unlike anything in Australia in 1900, and were certainly not such as to lend themselves to a Constitution similar to that of the United States. The

Supreme Court, in its interpretation of the South Africa Act, will therefore be guided largely by Canadian decisions. There is this great and fundamental difference, however, between South Africa and Canada, considered as federations: that there are not in South Africa two co-ordinate systems of government, not a federation with the sovereignty divided between the federation and the component States, but a genuine union. Questions of unconstitutionality in bills before the Parliament can, therefore, scarcely arise. In a manner of speaking, it may be said that South Africa is no federation (1).

Four provinces compose the Union, namely, Cape Colony, Natal, the Orange Free State and the Transvaal. The Governor-General is appointed by and represents the King. He is assisted by an Executive Council of Ministers.

The Legislature consists of the King, a Senate of forty members, one-eighth of whom are nominated by the Crown and the remaining thirty-two selected by the Legislatures of the four former colonies—eight for each colony. All hold office for ten years.

No person shall be capable of election to the Senate or House of Assembly who shall (1) have been convicted of any crime or offence for which he shall have been sentenced to imprisonment without option of a fine for a term of not less than twelve months, unless he shall have received a grant of amnesty or a free pardon or unless such imprisonment shall have expired at least five years before the date of his election; or (2) is an unrehabilitated insolvent; or (3) is of unsound mind and declared to be so by a court of competent jurisdiction (section 53).

The Lower Chamber is called the House of Assembly, and consists of 121 members, elected for five years. No coloured subject of His Majesty is eligible as a member of the Legislature, but only persons of European extraction being also British subjects. Electors for Cape Colony need not be of European descent, but this law can be changed by statute passed by two-thirds of the Senate and House of Assembly.

Members of both Houses must take the oath or make affirmation of allegiance; must not be office-holders under the Union,

(1) See 9 Edw. VII. c. 9, the Act for constituting the Union of South Africa.

but may be Ministers of State, members of the army or navy, or Crown pensioners.

Members can resign on giving notice of intention so to do. The South African Parliament can make laws for the peace, order, and good government of the Union, and it must assemble at least once annually. The Upper House cannot originate or amend any money bill. No other matter can be tacked to an appropriation bill, and, as is the case in England, financial measures can only be proposed by a Minister of the Crown at the instance of the Governor-General.

If the Upper House rejects a bill in two successive sessions a fresh legislative chamber has to be created which consists of the Upper and Lower Houses assembled together in joint session, and then the decision of the majority prevails; but where the bill in question is a money bill, then a majority of both chambers sitting together can settle the matter at once.

The Governor-General may

- (1) Assent to bills.
- (2) Veto bills.
- (3) Remit bills with his suggestions thereon for further consideration.
- (4) Reserve bills for consideration by the Home Government.

If the Crown in this instance does not assent within one year the bill drops. Even where the Governor assents the Crown may veto a bill within twelve months. The provinces are controlled by administrators appointed by the Governor-General, who is assisted by a council of twenty-five members elected triennially.

The Council can legislate as to a very limited number of local matters, and this legislation can be repealed by the Union Parliament. Thus the South African Constitution is unitary, not federal: the Union Parliament's authority overriding that of the Provincial Council on all matters, and the Provincial Councils having exclusive legislative powers in regard to none.

There are in the Supreme Courts courts of first instance and appeal. Appeal to the Privy Council is by leave of the Supreme Court in most cases.

Judicature.—The South Africa Act, 1909 (c. 9), constitutes a Supreme Court of South Africa, with original and appellate jurisdiction. The judges of appeal and other judges of the Supreme Court are appointed by the Governor-General in Council (section 100), and are only removable on an address from both Houses of Parliament in the same session praying for such removal on the ground of misbehaviour or incapacity (section 101). “There is to be no appeal from the Supreme Court of South Africa, or from any division thereof to the King in Council, but nothing is to impair any right which the King in Council may be pleased to exercise as to granting special leave to appeal from the Appellate Division of the Supreme Court to the King in Council.”

“The South African Parliament may make laws limiting the matters in respect of which special leave to appeal may be asked, but bills containing such limitation shall be reserved by the Governor-General for the signification of his Majesty’s pleasure, provided that nothing shall affect any right of appeal to his Majesty in Council from any judgment given by the Appellate Division of the Supreme Court under or in virtue of the Colonial Courts of Admiralty Act, 1890.”

PART IV.

J u d i c a t u r e

CHAPTER XXII.

COURTS OF JUSTICE.

History of the courts.—In William I.'s reign there were eight courts : (1) The Curia Regis, or Great Council of Tenants *in capite*, which discharged legislative, judicial, and executive functions. (2) The King's Court, composed of those councillors who were from time to time with the King temporarily or permanently (Carter's English Legal History, p. 25). (3) The Exchequer Court, a fiscal committee of the "Curia," which acted judicially in matters concerning the royal revenue. (4) The County Court (Shire Moot), which in Saxon days sat twice annually, and in Norman times at more frequent intervals. Its nominal judges were the county freeholders, its presidents being the earl and bishop, and latterly the sheriff or *vice-comes*. It had a jurisdiction civil and criminal. (5) The Hundred Court, with the freeholders of the hundred as judges, under a president known as hundred's elder, or *ballivus*. It had a similar jurisdiction to the County Court and there may have been an appeal from its decisions to the County Court. (6) The Manor Court, a court of varied jurisdiction depending probably on the particular grant from the King of "sac and soc" (right to hold court and take profits thereof) (a). (7) The

(a) The court here referred to is the court baron, where were settled all disputes relating to freehold land within the manor; and it also had a jurisdiction in personal actions where the amount claimed was not more than 40s. The jurisdiction of this court, as well as that of the customary court whereof the steward of the manor was judge to the exclusion of the copyholders, was

Burgh Moot or court of a borough, almost precisely similar to the County Court. (8) The Forest Court, regulating the royal forests and awarding punishments to the extent of death.

In the reign of Henry II. we hear of the "Court of judges of the Bench," which may have developed from the King's Court. There were five judges. Glanville (*b*), the justiciar and supposed author of the Commentaries bearing his name, was one of them. John's Magna Charta (1215) provided that Common Pleas should not follow the King, but be held in a fixed place, and this was the origin of the Common Pleas or Common Bench, which for centuries thereafter sat at Westminster to try causes between subject and subject.

After the Conquest the increasing business in the Curia and the frequent absence abroad of the Sovereign necessitated the creation of a functionary known as the justiciar, who was a great political and judicial officer and acted as viceroy when the King was out of England. The justiciar continued his office without interference till after the death of John, as Hubert de Burgh retained this post during part of the reign of Henry III. After

impaired owing to the gradual removal of actions to Westminster by writs of "Quia Dominis remisit curiam," "Accedas ad curiam," and the writ of *pone*, so called from the commencing words "*pone coram me et justiciariis meis*," and, secondly, as to real actions by the combined effect of 3 & 4 Will. IV. c. 27, s. 26, and 23 & 24 Vict. c. 126, s. 26, which practically transferred all jurisdiction as to these to the Common Pleas. Its jurisdiction was practically extinguished as to personal actions by the County Courts Act, 1867, which provided that no action which could be brought in a county court should be brought in the court of any manor or hundred or other inferior court not being a court of record. Any jurisdiction in tort which a manor or hundred court might possibly have exercised with reference to actions for libel, slander, seduction, malicious prosecution, false imprisonment, or breach of promise of marriage, may be said to have been abolished by the County Courts Act, 1919, which confers upon the county court the residue of tort jurisdiction which it lacked before.

(*b*) Glanville was justiciar *temp.* Henry II., and the supposed author of the "*Summa quae vocatur Glanville*," believed, according to Maitland, to have been written by Bishop Hubert Walter, his kinsman. This treatise is shorter than that of Bracton, and consists chiefly of reports of cases in the King's Court. Nevertheless, according to Maitland, it possesses traces of the subtle influence of Roman law, to the study of which the lectures of Vacarius, *temp.* Stephen, gave an impetus. Though the work is mainly confined to decisions in the King's Court, it must be borne in mind that the judges of that time were for the most part churchmen, who had a great veneration for the civil law.

Hubert's resignation there was no successor appointed. According to Langmead, Edward I. formally abolished an office which had been non-existent for several years. Edward I. also appointed in the early years of his reign De Hengham, Chief Justice of the King's Bench, and De Weyland, Chief Justice of the Common Pleas. After a time difficult to fix there was a Chief Baron of the Exchequer appointed (*bb*).

In spite of this regulation, the King's Bench judges encroached on the Common Pleas, which abounded in business, by a process called a Bill of Middlesex. The plaintiff falsely but collusively, to give the Court of King's Bench an excuse, averred that the defendant had invaded his close with force and arms (*c*)—whereas the defendant probably owed him money only (*d*). The defendant was arrested at the beginning of the action and placed in the custody of the marshal of the King's Bench, and this fact without more gave the King's Bench jurisdiction. In the time of the Stuarts it was thought advisable to acquaint the defendant with the real cause of his detention and a clause called the *ac etiam* was added. If defendant could not be found in Middlesex—the county for which the bill was obtained—

(*bb*) In 1312 a Chief Baron of the Exchequer was appointed, and according to some authorities this office was created in 1303, but this is improbable.

(*c*) The action above described was a species of the action for trespass *vi et armis*, which lay for the actual, or in rare cases fictitious, application of force to the plaintiff's land, or actual force to his goods or person. After the passing of the statute *In consimili casu*, Trespass on the Case or Case was gradually evolved from trespass *vi et armis*, and writs were formed to meet cases of (1) malfeasance (performance without force of an unlawful act); (2) misfeasance (negligent performance of a lawful act); and (3) non-feasance, for breach of a promise not under seal, and this action was known as an *assumpsit*, and to it we partly owe the evolution of the doctrine of valuable consideration. As to valuable consideration and the history of the doctrine, see Anson on Contracts, 16th ed., pp. 59-65; Blackstone, 21st ed., vol. 3, ch. 12.

(*d*) The action of debt entailed wager of law—i.e., the defendant swore to non-indebtedness and brought to court compurgators to testify to his character. After *Slade's Case* (1603 A.D.) plaintiff could use the *assumpsit* writ by averring a broken promise by the debtor to pay and thus obviate wager of law. After a time debt was based on a *quid pro quo*—i.e., that the plaintiff had done something for which he claimed a fixed money payment. Wager of law was abolished by statute in 1833. Detinue, the sister action to debt, was subject to wager of law until the plaintiff was allowed to use the action of trover (see Blackstone, 21st ed., bk. III., ch. 9, p. 152) if he fictitiously asserted that the defendant had found his chattel and was detaining same. For further particulars, see Matland, Equity, p. 357, and Stephen, 9th ed.

a writ of *latitat* was sued out, which enabled defendant to be arrested in the county where he sought refuge.

The Exchequer obtained jurisdiction over subject and subject cases by a writ of *Quominus*, the plaintiff averring that defendant would not pay him, "by which the less" he, the plaintiff, was able to pay the King what he owed him by way of tax. Henry II. was the inventor of the circuit system (c).

Thus, the three great courts of common law at the time of the Judicature Acts exercised jurisdictions almost parallel—at all events, as regards personal actions.

By the Uniformity of Process Act the co-ordinate jurisdiction of the three courts was formally recognised and variety and multiplicity of process put an end to (see Carter's English Legal Institutions, p. 67).

The common law procedure was simplified, and still further improvements were effected, by the Common Law Procedure Acts and the Judicature Acts, 1873 and 1875.

History of the Chancellor.—In old days the Chancellor was the King's chief chaplain, his confessor, and keeper of his conscience. He also acted as his secretary, and sealed the royal writs. At first the Chancellor was probably the most learned man in the King's Council, and in the reign of Henry III. he must have been an officer of the highest importance. The Provisions of Oxford, however, ordained that he was not to make new law by sealing novel writs and that he was only to seal writs for which there was an exact precedent on the register.

These provisions were very short-lived, and in the reign of Edward I. the statute *in consimili casu* (one of the Statutes of Westminster) provided that the Chancellor might seal a writ where there was one resembling it on the register. In the reign of Edward III. matters of grace were referred to the Chancellor

(c) When a judge went on circuit he held four royal commissions: (1) "Oyer and Terminer," to hear and determine all treasons, felonies, and misdemeanours; (2) "Gaol Delivery," to clear the county gaol of all prisoners; (3) "Assize," to determine questions relating to real property; (4) "Nisi Prius," to determine cases of debt and injury. This commission derived its name from the fact that the sheriff had to summon twelve men to Westminster at a given date, "*nisi prius iudices in comitatem venerint.*"

for consideration, and from that period his duties became more judicial (f).

Sometimes he sat alone; frequently with other members of the council and the common law judges. With the latter, though at times there were differences, he preserved in the main friendly relations.

By the reign of Henry VI. the Chancellor is already granting injunctions, and some of these injunctions prevented litigants from enforcing judgments obtained at common law. Wolsey was a powerful Chancellor. He procured the establishment of four Equity Courts, only one of which, viz., the Court of the Master of the Rolls, then head clerk of the chancellors, survived his downfall.

The chancellorship of Lord Ellesmere was conspicuous for his dispute with Coke as to whether a litigant who had obtained a judgment in a common law court by fraud (g) could be restrained by injunction from enforcing it. Ellesmere prevailed. Under Hardwicke and Nottingham equity was systematised. In 1813 one vice-chancellor was appointed, and in 1842 two more vice-chancellors, to take over the equity work of the Courts of Exchequer.

Equity had three jurisdictions at the time of the Judicature Acts : (a) exclusive jurisdiction in cases where common law gave no relief; (b) concurrent jurisdiction where common law gave inadequate relief; (c) auxiliary jurisdiction where common law courts were assisted by equity : e.g., equity would grant discovery from a litigant to help on a common law action. The

(f) Mr. Bolland, in a published lecture on the General Eyre, considers that some of the principles of equity were the work of the judges of the eyre, who decided matters of grace, and the reader is referred to the work itself.

(g) The Common Pleas possessed exclusive jurisdiction as to real actions as regarded the other superior courts and also as to fines and recoveries. Before the statute *De Donis, temp.* Edward I., the grantee of an estate tail to a man and the heirs of his body could, on having issue born capable of inheriting, bar the entail (i.e., treat it as a fee simple). The statute *De Donis* provided that the will of the donor as expressed in the deed of gift be strictly observed. After *Taltarum's Case, temp.* Edward IV., a practice arose of barring estates tail by a common recovery (a collusive action fought out from beginning to end), and of barring the claims of the issue by a simple court proceeding called a fine. By 3 & 4 Will. IV. c. 74 a deed enrolled in the court was substituted for common recoveries and fines.

work assigned to the Chancery Division by the Judicature Acts is the administration of the estates of testators and intestates, the taking of partnership or other accounts, redemption and foreclosure of mortgages, raising of portions or other charges on land, sale and distribution of proceeds of property subject to any lien or charges, execution of trusts charitable or private, rectification or cancellation of written instruments, specific performance of contracts as to real and leasehold estates, partition sales of real estates, wardship of infants and care of their estates.

Admiralty.—The word “admiral” is of Arabic origin. “Emir” or “Amir” meant rulers, and “al” meant “of.” Amir al Bahr meant a prince of the sea. The first use of the word “admiral” in England was in 1285 or thereabouts, and in the reign of Edward I. an admiral of the Bayonne (Baion) fleet was appointed (Carter, p. 135).

At the opening of the fourteenth century we hear of an Admiral of the Cinque Ports. There was no Admiralty Court—except local courts perhaps—till the middle of the fourteenth century (cf. Carter, p. 136), when, to check piracy, an admiral was appointed by Edward III. to deal with maritime crimes. By 13 Rich. II. c. 3 the admiral or his deputy was not to meddle with anything save such as was done upon the sea, and by 15 Rich. II., st. 1, c. 5, the admiral was to have no cognisance of contracts or other things done or transpiring inside a country, whether on land or water, nor of any wreck, but he might have jurisdiction over flotsam, jetsam, and ligan. The admiral, on the other hand, might enquire into deaths of persons and acts of mayhem in great ships in the main stream of great rivers below the bridges [or points] of the same rivers nigh to the sea, but not elsewhere.

The admiral in the reign of Edward III. took cognisance of certain civil cases as well as criminal, mercantile and maritime cases.

Towards the end of the fifteenth century a judge was appointed to assist the admiral. Henry VIII. by statute gave the admiral various civil functions, including a jurisdiction in respect of bills of exchange and contracts made abroad, but may be said,

though other statutes contributed, to have abolished the criminal jurisdiction by providing that treason, murder and felonies within the purview of the admiral be tried before the admiral or his deputy and three or four other substantial persons, who were invariably common law judges. This work was completed by the Central Criminal Court Act, 1834, whereby sea crimes were made triable in the Central Criminal Court, while by a more recent statute these offences can be tried at the Assize Courts therein mentioned. In the reign of Elizabeth there were disputes between the admiral and the common law judges as to prohibitions and an agreement was arrived at. The judges considered that they could issue these prohibitions as the Admiralty, in their opinion, was not a court of record.

According to Blackstone, the common law judges encroached on the Admiralty jurisdiction in relation to contracts made abroad by conniving at a fiction that these contracts were made at the Royal Exchange (*Commentaries*, vol. 3, p. 107).

By the combined effects of Admiralty Courts Acts the court gained control of all necessary jurisdiction, its procedure was rendered more rapid and effective, and machinery was provided for transferring certain admiralty business to certain convenient county courts.

As to appeals : Henry VIII. constituted the Court of Delegates to take over appeals from the Courts Christian and Admiralty Commissioners, which appeals were afterwards transferred to the Privy Council. This accounts for the grouping together of probate, divorce, and admiralty in the present High Court of Justice. By the Vice Admiral Courts Act, 1863, and the Colonial Courts of Admiralty Act, 1890, Colonial Courts of Admiralty were created with full civil powers. At the time of the Judicature Acts appeals from the British Admiralty Court and the secular Courts of Probate and Divorce established in 1857 lay to the Privy Council. By virtue of the Judicature Acts, these appeals now lie first to the Court of Appeal and ultimately to the House of Lords.

Admiralty business relates to such topics as bottomry and respondentia bonds, flotsam, jetsam, ligam, towage, salvage,

collisions and negligent navigation, transactions giving rights *in rem* against a ship, and other maritime matters.

Probate and Divorce.—William I., by severing the lay and clerical jurisdictions, urged into activity clerical courts with special jurisdiction over clergy and laity and a special procedure. The clerical courts took charge of wills of personalty, and their control continued till 1857, when a secular Court of Probate was created. The Ecclesiastics also assumed jurisdiction over lay immorality, punishing adultery, fornication and other deadly sin criminally, and this they are still supposed to be able to do, though such jurisdiction is in practice obsolete. Up to 1857 they gave decrees of judicial separation and administered relief in other matrimonial cases. After the creation of the secular Divorce Court in 1857 divorce *a vinculo matrimonii* became obtainable.

Courts affected by the Judicature Acts.—Prior to the Judicature Acts there were the superior courts of common law with jurisdictions nearly parallel as to common law and numerous other local courts, including the courts palatine. The King's Bench had an independent jurisdiction as to granting certain prerogative writs (*h*). The Court of Probate dealt with grants of probate and letters of administration on its non-contentious side, and on its

(*h*) Prerogative writs are not issued like writs *de cursu* to the subject as a matter of right, but are awarded at judicial discretion. *Mandamus* was a writ emanating from the King's Bench, and now from the King's Bench Division, and it lies to compel an inferior tribunal or corporation to do some act appertaining to its duty. The writ of *certiorari* is another King's Bench writ, and enjoins an inferior court of record (*i.e.*, a court "whereof the acts and judicial proceedings are enrolled for a perpetual memorial") to send up certain proceedings to the King's Bench (now King's Bench Division) in order that the legality of the proceedings might be reviewed, or, in other words, that the King's justices might be more certain of justice being done. The writ is also issued to bring up a peer charged with felony to the House of Lords for trial. The King's Bench Division (late King's Bench) was, and is, mainly concerned in the issue of writs of prohibition, which prohibit inferior courts from proceeding with a given case or cases, the converse to which is *procedendo*, directing an inferior court to give judgment one way or the other. The old writ of *quo warranto*, for which an information has now been substituted, still lies where a person is commanded to show cause why he has exercised a certain franchise or liberty. The writ dated from the reign of Edward I. It also lay in cases of non-user, misuse, or abuse of a franchise (see Stephen, vol. 3, ch. 12).

contentious side it revoked, and still revokes, wills for informality, insanity, or undue influence. The Divorce Court dealt with, and may be said to still deal with, matrimonial and legitimacy cases and matters incidental to the same. The old Court of Exchequer Chamber was abolished by the Judicature Acts. This tribunal first appeared *temp.* Edward III., when the Lord Chancellor, the Lord Treasurer, and other learned men were appointed to review errors in the Exchequer Court (31 Edw. III., st. 1, c. 12). By 27 Eliz. c. 8 a tribunal of Common Pleas and Exchequer judges was appointed to review King's Bench judgments, and by 1 Will. IV. c. 70 errors from any of the three great courts of common law were to be heard in the Exchequer Chamber by judges of the other two courts. An appeal lay to the Lords from the Exchequer Chamber. From the judgments of a Vice-Chancellor or the Master of the Rolls appeals lay originally to the Lord Chancellor sitting alone, but in 1857 an intermediate court of appeal was created, known as the Court of the Lords Justices. The tribunal consisted of two Lords Justices and the Lord Chancellor, if he thought fit to attend. An appeal lay from this court to the House of Lords. Prior to the Acts, admiralty appeals lay to the Judicial Committee of the Privy Council, and those from the Court of Probate to the Lords direct, whilst divorce appeals lay to the full Court of Divorce, with an ultimate appeal to the Lords. This full court consisted of the chiefs of the superior courts of common law, the senior puisne judge of each of such courts, and the judge ordinary (20 & 21 Vict. c. 85, ss. 55 and 56). Until 1880 only those matters which could not be heard by the judge-ordinary went to the full court, but after full court jurisdiction was conferred on the judge-ordinary the full court became an intermediate court of appeal.

The Judicial Committee of the Privy Council remained intact with this exception, that admiralty appeals went to the new court of appeal. The appellate jurisdiction of the Lords was abolished, but was revived by the Appellate Jurisdiction Act, 1876.

Present Courts.—The Judicature Acts created a Court of Appeal and a High Court of Justice. The High Court contained the following divisions: the King's Bench Division, the Common Pleas Division, and the Exchequer Division (the last two being

merged in the King's Bench Division in 1880), the Chancery Division, and the Probate, Divorce, and Admiralty Division.

The common law work of the County Palatine of Lancaster was also transferred to the High Court (2).

The Supreme Court of Judicature consists of two branches, namely, the Court of Appeal and the High Court of Justice.

The High Court of Justice is composed of twenty-five judges (the two additional judges recently appointed to the King's Bench Division are not to be regarded as necessarily constituting a permanent increase), and is divided into three divisions, namely, the Chancery Division, the King's Bench Division, and the Probate, Divorce, and Admiralty Division. It exercises the consolidated jurisdictions of the old Courts of Chancery, King's Bench, Common Pleas, Exchequer, Admiralty, Probate, Divorce and Matrimonial Causes Courts, and also of the London Court of Bankruptcy—but bankruptcy jurisdiction outside London is vested in the county courts. Bankruptcy and Winding-up work, and the judicial functions of the Railway Commission, are assigned to particular judges of the High Court. Every judge of the High Court can exercise all the powers of the Court, and can act in any division, but for the sake of convenience special classes of business are assigned to special divisions. The judges of the Court of Criminal Appeal are selected from the judges of the King's Bench Division, and for the most part appeals from inferior courts are heard by the divisional courts of the King's Bench Division.

The Commercial List.—In 1895 a court in the King's Bench Division was set apart for the trial of commercial causes arising out of the ordinary transactions of merchants and traders, and

(1) There were from medieval days three Courts called Courts Palatine—viz., the Courts of Lancaster, Durham, and Chester, that of Chester dating from the reign of William I. The powers of the grantees of these palatinates were almost royal. They selected their own judges and lower magistrates, processes ran in their name, and they could pardon offences. About the middle of the fifteenth century the Palatinate of Lancaster passed to the Crown, and that of Durham in the reign of William IV. After 1830, there were no local judges for Chester; and since that date the Chester judicial work passed to the judges of Assize and other functionaries.

“*inter alia* those relating to the transaction of mercantile documents, export or import of merchandise, affreightment, insurance, insurance banking, and mercantile agency and mercantile usages” (Yearly Practice, Published Notice as to Commercial Causes). “There is no definition of a commercial cause. It is a matter of judicial discretion” (*per* Lord Halsbury in *Sea Insurance Co. v. Carr*, [1900] 6 Com. Cas. 14). The procedure is expeditious and informal and a case occupies about two months from the issue of the writ till judgment (*k*).

Court of Appeal.—Prior to the Judicature Acts common law appeals were in an unsatisfactory state. Appeals lay to the Exchequer Chamber in cases of error, and where a judge signed a bill of exceptions the writ of error was a method of setting right a common law judgment where the fault appeared by the record itself. It is now superseded by appealing. There were errors in fact and errors in law; an instance of error in fact was that defendant as an infant appeared by solicitor instead of by guardian. Where, again, a judge in his directions mistook the law by ignorance, inadvertence, or design, counsel on either side could require him to seal a document called a bill of exceptions, wherein was stated the point on which he was supposed to err. This bill was afterwards examined in the Exchequer Chamber (Blackstone, vol. 3). By Ord. LVIII., r. 1 of the Rules of the Supreme Court appeals are by way of rehearing, and are brought on by notice of motion within the prescribed time after the trial. No point need be picked out at the trial, but one may appeal from

(*k*) Our commercial law is derived from the law merchant, which had two sources: (1) maritime law, and (2) inland commercial law. The maritime portion was based on the customary codes of Oleron, Wisby, Lubeck, and the Consolato del Mare, and the inland portion on those mercantile usages practised at the Courts of the Staple and Pie Poudre. The Court of the Staple, which took cognisance of cases relating to staple commodities, was held before the mayor of the staple town, two constables, and two alien merchants (Holdsworth, 1st ed., vol. 1), and was, like the maritime portion, international in character. Attached to the fairs and markets was formerly a Court of Pie Poudre (for the origin of the name see Blackstone, vol. 3). It was, according to Blackstone, the most expeditious court in the kingdom, as actions had to be commenced and disposed of in one day, unless the fair or market lasted longer. An appeal lay from its decisions by writ of error to the courts at Westminster, and these courts enforced its judgment. The judge was the steward of the lord of the market. Lord Mansfield took the most prominent part in incorporating into the Common Law system the customs of merchants.

the whole or any part of the judgment provided that the matter complained of is set out in the notice. The Court of Appeal may receive fresh evidence, direct a new trial (Ord. XXXIX., r. 6), and, in a word, administer such relief as the circumstances may require. Writs of error in civil cases were abolished by the Judicature Acts.

The Court of Appeal consists of six regular judges, and sits in two divisions, one of which is presided over by the Master of the Rolls. The Lord Chief Justice, who is the head of the King's Bench Division, the President of the Probate, &c., Division, who is the head of that division, and the Lord Chancellor, who is the titular head of the Chancery Division, are *ex officio* qualified to sit in the Court of Appeal. An ex-Lord Chancellor can sit also, and provision is made for calling in a judge of the High Court to reinforce the Court of Appeal when necessary. Subject to certain exceptions, an appeal lies from the High Court to the Court of Appeal from every judgment or order of the High Court, but no appeal lies in criminal matters, and in the case of an appeal from an inferior court, only by leave.

Divisional Courts.—*The Divisional Court.*—This is a tribunal consisting of two or more judges with a jurisdiction partly appellate and partly of first instance. It takes cognisance of—

- (a) certain proceedings on the Crown side of the King's Bench Division (Ord. LIX., r. 1);
- (b) it took cognisance of appeals from the decisions of revising barristers till that office was abolished, and it still takes cognisance of certain matters arising out of election petitions (cf. *Pope v. Bruton* (1900), 17 T. L. R. 182; *Ex parte Ayres* (1886), 54 L. T. 296; *Marsland v. Fuchman* (1886), 2 T. L. R. 398;
- (c) certain appeals from county court judges;
- (d) proceedings directed by any statute to be taken before the court and in which the decision of the court is final;
- (e) certain cases of *habeas corpus* (see Ord. XLIX., r. 1, and notes to Annual Practice as to same);
- (f) certain appeals from a judge of the King's Bench Division in Chambers where the matter decided does

not concern the practice of the court or its procedure;

- (g) appeals from petty or quarter sessions;
- (h) appeals from inferior courts generally;
- (i) appeals from county courts (Ord. LVIII., r. 9A);
- (k) appeals from county court orders in bankruptcy as to provincial matters.

The rule that two or more judges may decide appeals in a Divisional Court has given rise to considerable litigation in cases of a difference of opinion on the part of the two judges, and the old custom was in such cases for the junior judge to withdraw his judgment. In a case of this kind Channell, J., expressed the view that the decision appealed against ought to stand (see *Metropolitan Water Board v. Johnson*, [1913] 3 K. B. 900).

There are Divisional Courts in the Probate, Divorce, and Admiralty Division. Where a Divisional Court consists of two judges and there is a division of opinion, the judgment of the court appealed from stands (*Poulton v. Morris* (1913), W. N. 360). Appeals under the Matrimonial Causes Act are heard before a Divisional Court of the Probate, Divorce, and Admiralty Division.

Assizes.—The sittings of the Supreme Court are in London, but provision is made for administration of justice in the country by commissions of assize, and for this purpose the country is mapped out into circuits. The judges of the King's Bench are the only judges who go on circuit, and as sometimes, owing to press of business or illness, the judges cannot get through their circuit work within the prescribed limits of time, provision is made for supplementing them by other commissioners. Any king's counsel on the circuit is qualified to act as a commissioner of assize, and county court judges also may be included in the commission. Criminal courts in general will be dealt with in the next chapter.

The Civil Jurisdiction of the House of Lords.—The jurisdiction of the House of Lords as a court of final appeal in English civil cases now rests on the Appellate Jurisdiction Act, 1876. By section 3 of that Act it may hear:—

1. Appeals from the Court of Appeal in England.

2. Appeals from any court in Scotland from which error on an appeal lay at or before the commencement of the Act to the House of Lords by common law or by statute.

3. They, until recently, could hear all appeals from the Irish courts, but now only appeals *from* the Court of Appeal in Northern Ireland lie to the House of Lords (Government of Ireland Act, 1920, s. 49) and appeals from the Irish Free State courts have passed to the Privy Council (Annual Practice for 1925, p. 2118).

Local Courts.—Besides the county courts and the courts of quarter sessions, which, as inferior courts, exercise general civil and criminal jurisdiction throughout the country, there are certain local courts of civil jurisdiction which must be noted. The most important is the Chancery Court of the County Palatine of Lancaster, which, within its local limits, has similar powers to those of the Chancery Division. There are also a few courts having full common law jurisdiction within their local limits, such as the Mayor's Court of London, the Passage Court of Liverpool, and the Salford Hundred Court. The Mayor's Court is a Court of law and equity.

As to the Judicial Committee of the Privy Council, see Ch. XVII.

The County Court.—In old days the claims of poor suitors were somewhat inefficiently dealt with by courts of request and a few scattered local courts (*l*).

In the year 1846 our present county courts were established, the main functions of which were to afford relief to poor suitors. Latterly, however, the duties of county court judges have been materially increased. Most of these judges have full jurisdiction as judges in bankruptcy. As to ordinary cases, they have juris-

(*l*) The notion of a court for poor men was not a novelty. In old days there was a Committee of the Privy Council which gave relief to the indigent and members of the royal household. It was associated at first with royal progresses, but *temp.* Henry VIII. fixed its habitat in Whitehall, and its judges became known as Masters of Requests. It gave equitable relief and incurred the odium of the common law judges. It came to an end during the Long Parliament. It is not to be confounded with Courts of Requests established in numerous towns at the request of the inhabitants.

diction up to £100 under the County Court Acts, 1888 and 1903. They are judges of equity as well as of common law. They alone take cognisance of cases under the Employers' Liability and Workmen's Compensation Acts. They have jurisdiction as to winding-up companies when the capital is under £10,000. As regards suits for administration of estates of deceased persons, actions for the execution of trusts, actions for the redemption and foreclosure of mortgages, for specific performance of contracts relating to the sale of freehold or leasehold estates, and as to certain other causes of actions of an equitable kind, these courts have jurisdiction up to £500. When the subject-matter of the dispute does not exceed £5, neither litigant can demand a jury, and the judge may refer the matter to the registrar. Again, when the subject-matter of the dispute does not exceed £20, no appeal lies to the High Court, except by leave of the judge.

By the County Courts Act, 1919, the county courts have acquired a complete jurisdiction in tort, and can try libels, slanders, cases of false imprisonment, seduction, malicious prosecution, and, as regards contract, also breach of promise of marriage.

Cases where large amounts are in dispute are often remitted from the High Court to the county court for decision, either by consent, or where the plaintiff is adjudged too poor to pay the defendant's costs if the defendant should win the case. So, also, where the amount in dispute, though originally exceeding £100, has been reduced, by payment into court or otherwise, to less than that figure. By consent of both sides a county court judge may decide any common law action. They also take cognisance of interpleader cases sent to them by the High Court, and by the rules of the High Court they hear judgment summonses in High Court cases as well as in their own. These summonses have for their ultimate object the committal of debtors to prison for neglecting to pay judgment debts when since the judgment they have had the means so to do. They have also certain functions which they share with justices of the peace under the Lunacy Act, 1890. A County Court Judge must be a barrister of seven years standing, or upwards, to be eligible for the position.

CHAPTER XXIII.

THE CRIMINAL COURTS.

History of the office of justice of the peace.—Up to the time of Richard I. frankpledge was resorted to for maintaining public order (*a*), but, by a decree of Richard I.'s justiciar made in 1195, knights were assigned to receive oaths for the preservation of the peace. These knights were probably the precursors of the conservators of the peace, afterwards known as justices of the peace, who are first heard of in the reign of Edward III.

In 1253 and 1264 there appear *custodes pacis*, who were occasionally chosen by the landowners of the shire but afterwards appointed by royal writ (Langmead, p. 172).

By 1 Edw. III. st. 2, c. 16, it was ordained that for the better maintaining of the peace good and lawful men be assigned to keep it, and by 34 Edw. II. c. 1 these men received the power of trying felonies and also obtained the title of justices of the peace (*id.*). These justices were the precursors of the present courts of quarter session.

Blackstone, however, states that the justices “seldom if ever try any greater offence than small felonies within the benefit of clergy; their commission providing that if any case of difficulty arises, they shall not proceed to judgment but in the presence

(*a*) For the detention of persons suspected of crime there was in early days no adequate machinery, but such as there was must probably be attributed to the agency of the courts leet. There were leets of hundreds, leets of manors, and the sheriff's tourn or leet, and their chief functions were to hold views of frankpledge—a system of collective responsibility whereby a certain number of freemen were pecuniarily responsible for wrongs committed in their districts. These courts tried small offences and made presentments of more serious ones to the King's justices. These courts sat once a year. The sheriff's court was a court exercising the same jurisdiction and was presided over by the sheriff. It was held in certain manors and hundreds once a year, but as to manors it was subject to the rights of soc and sac. One of its functions was to administer the oath of allegiance to youths on attaining years of discretion.

of one of the justices of the King's Bench or Common Pleas or one of the judges of assize" (Blackstone, vol. 4, p. 271). They cannot try any newly-created offence without express power given them by the statute which creates it.

"These justices," says Blackstone, "are appointed by the King's special commission under the Great Seal, the form of which was settled by all the judges in 1590." Numerous statutes have conferred on justices jurisdiction both civil and criminal.

County justices.—For a long time prior to the Local Government Act, 1888, all the administrative work of the county fell to the lot of the justices, but that Act, though it left religiously alone their judicial work, withdrew the bulk of the administrative functions formerly exercised by county magistrates. It may be mentioned, however, that by means of a joint committee the magistrates and the county council jointly superintend the county police.

A man is appointed a county magistrate by the Lord Chancellor, who usually selects a person recommended by the Lord-Lieutenant. The Lord Chancellor, however, it is believed, can appoint county justices independently of the Lord-Lieutenant (Report of Royal Commission on Selection of Justices, 1910). The post has no salary attached to it, and since the Act of 1907 came into force, no property qualification is necessary.

Borough justices.—Dr. Odgers, in his work on local government, gives an interesting account of borough magistrates prior to the passing of the Municipal Corporations Act, 1835. Not only, it seems, were they ignorant of law, but often they lacked the rudiments of education. Recorders were often laymen, borough coroners, petty tradesmen, and aldermen *ex officio* magistrates.

The Municipal Corporations Act, 1835, purged the Augean Stable by substituting magistrates appointed by the Lord Chancellor for ignorant and undesirable persons who had contrived to get elected as members of the corporation. That Act is now repealed, being superseded by the Municipal Corporations Act, 1882.

The mayor is a magistrate *ex officio* during his year of office and the year after.

Boroughs can petition the Crown for the appointment of a stipendiary magistrate, who is then appointed by the Home Secretary. He must be a barrister of at least seven years' standing. This functionary, sitting alone, has the same powers as a petty sessional court of two or more justices.

The Lord Mayor and aldermen of the City of London have the privileges of the stipendiary.

Powers of magistrates generally.—One magistrate acting alone has very limited powers. He can, however, hear a case prior to committing for trial, bail the prisoner, take his recognisances to appear, and discharge him when the evidence is insufficient to commit him for trial. A petty sessional court consisting of two justices has far more power of acting judicially than one ordinary justice sitting alone, and this is true of county magistrates as well as borough magistrates.

Numerous civil judicial powers have more or less recently been conferred on magistrates. They can make orders in bastardy cases; they can grant judicial separations between husband and wife; they can make maintenance orders against a husband in favour of his wife up to £2 per week; they have a limited jurisdiction as to ejectment; besides other powers. They can license places for sale of intoxicants. They have many duties purely ministerial (Report of Royal Commission on Selection of Justices, 1910).

Court of quarter sessions.—This court is a court of first instance and of appeal. It must meet once a quarter. Two or more justices make a quorum, and one of them, the chairman, acts as judge, deciding questions of evidence and summing up to the jury, though both or all are judges in reality. Two or more courts may sit when the work is heavy. The court can try all indictable offences with the following exceptions: treason, murder, and capital offences, any felony (burglary excepted) which, when committed by a person not previously convicted of felony, is punishable with penal servitude for life, misprision of treason, offences against the royal title, prerogative of government or either House of Parliament, offences punishable by a

praemunire, blasphemy, perjury and subornation of perjury, making or being privy to the making of false oaths, administering of unlawful oaths, forgery, burning corn, grain, wood, &c., bigamy, abduction, concealment of birth, bribery, certain conspiracies, theft of records, stealing bills, &c. and documents relating to real property, frauds by trustees, factors, &c. punishable under the Larceny Act of 1916 (Stephen, vol. 4, pp. 249 *et seq.*).

In addition to this original jurisdiction this court exercises appellate jurisdiction on the merits from decisions of magistrates. An appeal lies from its original decisions to the Court of Criminal Appeal on points of law, law and fact, fact alone, and sentences. Though justices in quarter sessions can impose very heavy sentences, no legal qualification is necessary either for the members of the court or the chairman. They entertain appeals as to questions of rating (Local Government Act, 1888, s. 8).

Borough quarter sessions.—Where a borough has a court of quarter sessions the court sits four times a year, and its judicial functions are identical with the county court of quarter sessions. Its judge is the recorder, who then becomes a borough magistrate *virtute officii*. He must be a barrister of at least five years' standing. He is not eligible to stand for his borough in the House of Commons, neither can he be elected a member of the corporation. When necessary, he may appoint a deputy, similarly qualified, to do his work. He has no powers of granting licences to sellers of alcohol, neither can he take cognisance of rating appeals (Odgers, Local Government, pp. 97, 98).

The Central Criminal Court.—The present Court was constituted by the Central Criminal Court Act, 1834 (c. 36), its jurisdiction embracing the City of London and adjoining parts of Essex, Kent, and Surrey. Before the Act cases were tried at the sessions house, Old Bailey, under a commission of oyer and terminer for the City of London and a commission of gaol delivery for Newgate gaol. These commissions were issued at the commencement of each mayoralty, and were issued to the Lord Mayor, the Lord Chancellor, the King's Ministers and Secretaries of State, the judges of the Courts at Westminster, the Attorney- and Solicitor-General, the aldermen of the City of London, the Recorder, the Common Serjeant, and the judges of the Sheriff's

Court, any two of whom were entitled to act judicially at a trial. A charter of Henry I. granted to the citizens of London the privilege of choosing their own justiciar, who was to hold pleas of the Crown, and a charter of Edward conferred on the Lord Mayor the right to act as a justice of gaol delivery. The Central Criminal Court Act, 1834, provides that the Lord Mayor, the Lord Chancellor or Lord Keeper, the judges of the King's Bench, Common Pleas, and Exchequer, the Dean of the Arches, the Recorder, the Common Serjeant, the Aldermen, the judges of the Sheriff's Court, ex-Chancellors, ex-judges, and others nominated by the Crown, shall be the judges of the Central Criminal Court. The Lord Mayor and aldermen are still in theory judges, but by ancient custom the Lord Mayor and aldermen do not act judicially, neither do the Recorder, the Common Serjeant, and the judges of the Sheriff's Court try the more serious offences, though to form the necessary quorum either a Lord Mayor or an alderman sit by the side of the judge. By section 15 of the Act offences on the high seas can be tried at the Old Bailey, though these cases, for the sake of convenience, are now also triable at certain assize courts. By the Central Criminal Court Act, 1856 (c. 16), the King's Bench (now King's Bench Division) may remove into the Central Criminal Court indictments for felony or misdemeanour committed beyond its jurisdiction, and by 25 & 26 Vict. c. 5 persons accused of murder in England or Wales under the Mutiny Act may be tried at the Central Criminal Court. The Winter Assizes Act, 1876 (c. 57), and the Spring Assizes Act, 1879, give power by Order in Council to annex the neighbouring counties or part of them to the Central Criminal Court for purposes of trial.

Indictments under the Corrupt Practices Act can be tried at the Old Bailey. The sessions are held once a month, or oftener if need be. (For the Court of Criminal Appeal, see p. 57).

King's Bench Division criminal side.—The King's Bench Division, as successor of the King's Bench, can, but does not, try all indictable offences in England; but though it has this jurisdiction it only exercises it in the following cases—

- (1) where an indictment has been moved into the High Court by writ of *certiorari* (Archbold);

- (2) cases where a true bill has been found against the prisoner in London or Middlesex;
- (8) where an information *ex officio* has been issued by the Attorney-General or through the agency of the Master of the Crown Office at the order of the High Court (*ibid.*);
- (4) where there has been neglect or delay by an official with reference to his duty respecting a writ for election of members to the Commons;
- (5) oppressions and crimes committed by governors of colonies and other public officials (as to governors see 11 Will. III. c. 12; as to public officials outside Great Britain see 42 Geo. II. c. 85; and as to Indian officials see 10 Geo. III. c. 47).

It is somewhat doubtful whether cases of treason or felony can be tried by the King's Bench Division under the above Acts (cf. *R. v. Shawe*, 17 R. R. 370).

Criminal trials in this court can be tried either before a single judge, or *in banco* before judges. The Attorney-General can claim a trial *in banco*, but the prisoner must obtain special leave. A special jury will be granted for misdemeanours on payment of extra fees (Archbold).

Assize Courts.—For assize purposes England and Wales are divided into eight circuits, the judges visiting one important town in each county, generally three times a year; and assizes are held at Leeds, Liverpool, and Manchester four times annually. In the reign of Henry I. we hear of judges *in itinere*, who acted under commissions granted them by the King. These itinerant judges were not necessarily judges, but simply royal commissioners appointed *pro hac vice*, and judges are still supposed to be commissioners, but now they are not bound by the terms of their commissions, and every commissioner of assize, be he a judge or only a commissioner, has the full power of a judge of the High Court of Justice. The commissions under which the judges of assize sit are: (1) assize, which empowers them to deal with cases sent to them for trial by the King's Bench Division; (2) gaol delivery, which enjoined them to clear the gaol of all prisoners awaiting trial either in custody or on

bail, but now owing to the Assizes Relief Act, 1889, certain prisoners can be committed to quarter or borough sessions for trial whether the judges visit the assize town or not before the sessions in question; (8) commissions of oyer and terminer, enabling them to try treasons, felonies, and misdemeanours in a given county. Civil cases are also heard at the assizes under commissions of *nisi prius*.

The Lord Lieutenant.—This functionary first appears in the Tudor period. He is appointed by the Crown from amongst the county nobility or rich squirearchy. In process of time he relieved the sheriff of the county of the control of the militia. He retained nominal control over that force till the year 1871, and he is now usually president of the county association under the Territorial and Reserve Forces Act, 1907. He is *ex officio* a magistrate for the county, and on his recommendation county magistrates are appointed, and also the *Custos Rotulorum* (custodian of the county records).

Clerk of the Peace.—This officer is now appointed by a joint committee of quarter sessions and the county council. He is usually paid fees for what he does instead of a salary. He has various duties. He is clerk to the county council; he issues precepts to overseers (see *post*, Chap. XXXVIII.); he has certain duties *re* quarter sessions juries and jury lists in general; he keeps the records of quarter sessions and justices out of session; he or his deputy usually attends the justices in quarter sessions and advises them as to law matters. He is almost always a solicitor by profession. When he devotes his entire time to county duties he, like other county officials, cannot sit in Parliament.

Clerks to magistrates.—These officials or their deputies usually attend the magistrates at petty sessions, write down the depositions and give legal advice to the magistrates. The post is a salaried one, and is almost invariably given to a solicitor. They are paid by the county council (Local Government Act, 1888, s. 84) or borough council (*b*).

(b) As to their appointment and removal, see 40 & 41 Vict. c. 43, ss. 5, 7.

CHAPTER XXIV.

THE CORONER.

Office of coroner.—According to Maitland the office of coroner dates from 1194. Three knights and one clerk were to be elected in the county court to keep the pleas of the Crown (Maitland, p. 44).

The duties of the ancient coroner resembled in many respects his duties at the present day, but amongst other things he had to keep a roll of suspected persons, to act as a check not only on the sheriff but on the jury of presentment.

Again, when a man who was suspected of a crime fled to the nearest church for safety the coroner was sent for. The coroner talked with the refugee, giving him the option of abjuring the realm or throwing himself on his country. If the prisoner chose the first alternative he was taken to the nearest available port and shipped, and if he returned was executed. Abjuring the realm in this instance entailed forfeiture of property. Finally, when a man desired to appeal another of felony, the coroner was approached.

The ancient coroner had also jurisdiction as to wreck, whales, sturgeons, and deodands.

Coroners of present day.—The coroner has still jurisdiction in cases of treasure trove, and where the sheriff is personally interested in a case the coroner acts as his substitute, but his chief duty is, with the aid of a jury, to inquire into the deaths of persons who have died suddenly, by violence, under suspicious circumstances, in prison, or at the hands of the hangman. The inquest is held *super visum corporis*. The jury must be composed of at least twelve men, and the number must not exceed twenty-three. The witnesses are examined on oath, the coroner discharging the office of judge. The coroner can enforce a *post mortem* examination, and insist on the attendance of medical and

other witnesses. He can order exhumation, though in cases of doubt, or where other graves would be interfered with, he usually gets the Home Secretary's order. The finding of the jury in cases of murder or manslaughter must be attested by the hands and seals of the jury and also the coroner. The coroner can commit the accused for trial, and in manslaughter cases admit him to bail.

The signed and sealed inquisition is a sufficient warrant to try the accused without the necessity of the grand jury finding a true bill for murder or manslaughter. It is the practice, however, for the case to be heard before the magistrate in the usual way and then for the grand jury to find a true bill. The depositions taken before the coroner and those taken before the magistrate are sent to the assize court where the trial is to take place. The coroner holds inquests on treasure trove.

The coroner for the City of London, under a local Act, may inquire into the outbreak of fires, holding an inquest, which may result in a verdict of arson (51 & 52 Vict. c. 38).

Various kinds of coroners.—There are 200 county coroners, who are chosen by the county council, and 76 borough coroners, who are chosen by the borough council, and 54 franchise coroners, chosen according to the charter of prescription. For example, the coroner for Westminster is chosen by the dean and chapter. Borough councils cannot elect a coroner unless they possess more than 10,000 in population and in addition possess a bench of borough magistrates. A county coroner must be a freeholder in the county. A High Court judge is a coroner *virtute officii*, but no instance is recorded of judges holding inquests (Home Office Committee on Law relating to Coroners, 1910).

Removal of coroner.—The Lord Chancellor can dismiss the coroner for inability or misbehaviour, and where he misbehaves by omission or commission he is generally guilty of a misdemeanour.

CHAPTER XXV.

THE SHERIFF.

The sheriff (*vice-comes*) was formerly the deputy of the earl or ealdorman of the shire, and when the bishop and earl gradually desisted from judicial work at the county court the sheriff took upon himself their functions. When in the reign of Henry II. King's justice began to override local justice, it frequently fell to the lot of the sheriff to execute the King's writs. To this circumstance can be attributed the present function of the sheriff in executing writs of *fiery facias*, *elegit*, *capias*, &c.

There are two kinds of sheriffs, viz., sheriffs of counties and sheriffs of certain ancient cities and boroughs, chosen by those towns (as to these localities, see Odgers, *Local Government*, 1st ed., pp. 95 and 96).

The county sheriff is elected in the following manner :—The Chancellor of the Exchequer and certain judges of the High Court meet at the Royal Palace of Justice, the Strand, Middlesex, on November 12 in each year, and choose three men of sufficient means from each county. The Sovereign pricks the name of one of these three men, who is then duly constituted sheriff of the county for the year. The sheriff is bound to serve without salary, but he is consoled by the fact that he takes precedence over the entire county, the Lord-Lieutenant excepted. If he refuses his services he can be fined. His duties are to execute High Court writs, summon juries, supervise executions of persons sentenced to death, and perform the duty of returning officer at a Parliamentary election. Since the passing of the Prisons Act, 1877, the sheriff has no longer control over prisoners in his county. He has to wait upon the judges at the assizes, and to pay liberally for their entertainment. Though almost all the duties of the sheriff are undertaken by his deputy, the under-sheriff, the former is responsible for the acts of the under-sheriff and all

persons engaged under him, *e.g.*, bailiffs who execute writs of execution. Where the sheriff's underlings commit tortious acts in the course of their employment, the sheriff is responsible, *e.g.*, trespassing in a man's house.

When judgment has been entered in the High Court for an unliquidated amount (interlocutory judgment), it often falls to the lot of the sheriff to assess the damages. On these occasions the under-sheriff sits in court as judge and hears both sides on the question of damages and all matters relevant thereto. A jury of twelve men then fix the damages. He has similar functions in compensation cases where land is compulsorily taken.

PART V.

P a r l i a m e n t.

CHAPTER XXVI.

THE HIGH COURT OF PARLIAMENT.

The distant precursor of what we now call the High Court of Parliament was the Curia Regis, its remotest ancestor being the Witan, which was a national court, a national executive, and in a minor degree a legislature (a).

Within the Curia Regis there were noteworthy cleavages. (1) In 1215, when the new Court of Common Pleas, in obedience to Magna Charta, took up its quarters in a fixed place, viz., Westminster. The provision prescribed *ut communia placita non sequantur personam domini regis*, but *assignentur in aliquo certo loco*. (2) When, after the fall of the Justiciar in the reign of Henry III. (b), the three great courts of common law split off from the council. (3) When the council separated from Parliament in the reign of Richard II.

After the second cleavage appellate jurisdiction passed to the Lords. When we speak now of the High Court of Parliament we mean the judicial functions claimed by our Legislature, viz. : (1) The appellate jurisdiction of the Lords, both civil and criminal. (2) The joint judicial and quasi-judicial functions of the Lords and Commons as to impeachments and bills of

(a) The expression "Curia Regis" had various meanings, to wit : (1) The Great Council of the Realm ; (2) The King's Court—i.e., the Court held by the King's continual councillors ; (3) The County Court, at which royal justices periodically attended ; (4) Those great assemblies at Easter, Whitsuntide, and Christmas when the King wore his crown.

(b) See Chap. XXII.

attainder. (3) The judicial functions of the Lords and Commons within the orbits of their respective privileges. (4) The jurisdiction of the Lords and the Commons in their respective committees as to private bills. The primary function of the High Court of Parliament was probably judicature and the primary function of the Model Parliament was judicature. In the statutes of the Lords ordainers (*tempore* Edward II.) we come across the following passage: "Whereas many folk are delayed in the King's Court because defendants allege that the plaintiffs ought not to be answering in the absence of the King, and many also are wronged by Ministers, which wrong they cannot get redressed without Parliament: we order that the King hold a Parliament once a year or twice if need be, and that in a convenient place and in the same Parliament state pleas which have been delayed, and pleas about which the judges differ be recorded and determined" (Pollard, *Evolution of Parliament*, p. 35). (5) The judicial functions of the Lords as to claims to ancient peerages, provided that the King (as he has done for over two hundred years) refer such claim to them. (6) The judicial function of the Speaker and certain members of the Chairman's panel when they decide whether any given bill is a money bill. (7) The right of the Lords as a court of first instance to try peers by blood of England, Scotland, or Ireland for treason or felony, and also peccesses of the three kingdoms by blood or marriage.

The most ancient of these judicial functions is probably the right of the Lords to try peers for crime, as the Witan was a court for the trial of great offenders and so was the feudalised Witan of the Normans.

Up to the reign of Edward I. the Court of King's Bench, or *Coram Rege* Court, was the supreme Court of Appeal as regarded civil matters, but Fleta (c) writes as follows: *Habet rex curiam suam in concilio suo in Parliamentis suis ubi terminatæ sunt dubitationes judiciorum novisque injuriis emersis nova consti-*

(c) Fleta was not the name of this author, who wrote from the Fleet Prison, and was believed to be a degraded judge who lived in the reign of Edward I. The work ascribed to him is a Commentary, insignificant beside that of Bracton, written in Latin, and of some note because Fleta was the last commentator to write in that tongue.

tuuntur remedia et unicuique justitia prout meruit retribuetur ibidem (Fleta, bk. II., ch. 2, De Differentiis Curiarum).

This court, which settled judicial doubts and devised new remedies for injuries as they arose, will strike the reader at first sight as being the precursor of the House of Lords, regarded as an Appellate Civil Court, in which aspect it was afterwards known as "the High Court of Parliament," though in reality appellate civil jurisdiction was only one judicial function of that court.

This court was held in the presence of prelates (who were forbidden by the Constitutions of Clarendon to give a verdict of "guilty" in any case involving loss of life or limb), earls, barons, the "proceres"—whoever they were (d)—and other skilled men.

According to some views, when the Curia Regis split up into the courts of justice the King in Council remained the final Court of Appeal, but no mention is made of this by Bracton, who wrote in the reign of Henry III. and treated the King's Bench as the Appellate Court.

No criminal jurisdiction in the Commons outside their privileges.—The Commons never, except on two occasions, laid claim to exercise criminal jurisdiction, or indeed any purely judicial function outside their privileges, and in 1399 both Houses passed resolutions that the judicial power of Parliament was not vested in the Lower House.

The two occasions on which they usurped criminal judicial functions were these: the case of Floyd in 1621, and the case of Mist in 1721. Edward Floyd was a barrister and a Roman Catholic, who wrote slightly of the Elector Palatine, and the Commons, animated by Protestant zeal, sentenced Floyd to the pillory and ordered a whipping and a fine of £1,000, with imprisonment for life thrown in. The Lords remonstrated, and in the end the Commons allowed Floyd to be tried in the Lords. The Lords inflicted a punishment still more severe on Floyd, though the whipping was remitted. Here both Houses illegally

(d) The "proceres" have been identified by some with the ancient order of Vavasours

usurped criminal judicial functions (cf. Langmead, p. 426 and note).

In 1721 *Mist*, a printer, was committed to Newgate by the Commons for printing a Jacobite newspaper which the Commons deemed a traitorous libel. This was an illegal extension of the privileges of the House of Commons.

At the present day the privilege committee of the Lords invariably tries claims to ancient peerages, though in strictness the King has a prerogative right to refer these claims to any court he selects. As, however, the Sovereign has not attempted to exercise this prerogative for over two hundred years, it is probably obsolete.

No original civil jurisdiction in the Lords.—The House of Lords considered that it possessed original jurisdiction to try civil cases; they tried to assert this jurisdiction in the case of *Skinner v. The East India Company*, but were forced in the end to abandon their claim (*Skinner v. East India Company*, 6 State Trials 710).

In the case of *Shirley v. Fagg* the Commons contested the right of the Lords to hear equity appeals, but were unsuccessful.

Effect of the Judicature and Appellate Jurisdiction Acts.—By the Judicature Acts, 1873-1875, the appellate jurisdiction of the Lords was taken away, but was revived by the Appellate Jurisdiction Act, 1876.

By the above Act this court is to try all English, Irish and Scotch appeals. Though all the Lords may act as judges, by convention the lay peers absent themselves, and the statute provides that no appeal can be heard unless there be present three at least of the following persons: (1) the Lord Chancellor; (2) a Lord or Lords of Appeal in ordinary; (3) Lords of Parliament who have held high judicial office.

The court can sit during a prorogation and after a dissolution of Parliament, and in cases of difficulty their lordships may call to their assistance the King's Bench Division judges. The House of Lords is now a court of final appeal in criminal cases by virtue of the Criminal Appeal Act, 1907. They can hear appeals as to all cases cognisable by the Court of Criminal Appeal, which comprise appeals from the verdicts of juries and, presumably, also from the convictions by magistrates of persons

as incorrigible rogues, and from sentences by magistrates of persons to Borstal treatment (see Criminal Justice Administration Act, 1914). For further particulars see Odgers, Common Law, vol. 2, 2nd ed., where the whole matter is fully discussed.

The Lords have for centuries tried all peers by blood and peeresses by blood or marriage for treason or felony, under a statute of Henry VI.

The accused is summoned or arrested in the ordinary way and committed for trial by justices of the peace.

The case then goes before a grand jury. If the grand jury find a true bill the accused may plead peerage, but whether he does so or not the case is removed to the House of Lords by writ of *certiorari*.

If Parliament is sitting the accused is tried before the Lords themselves as judges of law and fact, a judge appointed by the King as lord high steward presiding. Each peer then gives his verdict, commencing with the youngest peer.

If Parliament is not sitting the King appoints a lord high steward, who acts as judge as to law, and a minimum of twelve peers—though all have a right to attend—act as judges of fact.

Spiritual peers have a right to be present until the time for delivering a verdict arrives, and then, in obedience to the Constitutions of Clarendon, they retire after protesting.

Irish and Scotch peers and peeresses are triable before the Lords, but not bishops or their wives.

Impeachment.—An impeachment is a judicial proceeding against a lord or a commoner who is accused of a high crime or misdemeanour, or of treason or felony.

The first recorded case of impeachment occurred in 1376, when Lords Latimer and Neville and four commoners—viz., Lyons, Ellys, Peachey, and Bury—were charged with: (1) removal of the staple from Calais; (2) lending the King money at usurious interest; (3) buying Crown debts for small sums and then paying themselves in full out of the Treasury.

In 1386 Michael de la Pole, the Chancellor, was dismissed for official misconduct after impeachment. William de la Pole was impeached in the reign of Henry VI. and after this there was

no impeachment till the reign of James I., bills of attainder taking their place. A bill of attainder amounts simply to trying, convicting and sentencing a man by Act of Parliament, but in some cases at any rate the proceedings were not unfair and the prisoner could be heard in his own defence, *e.g.*, *Case of the Regicides*.

In 1621 Lord Bacon and Sir Giles Mompesson were impeached, and down to the Revolution there were forty cases of impeachment.

From the accession of William III. to the death of George I. there were fifteen cases. There was one case during the reign of George II. The case of FitzHarris was noteworthy, as it raised the question whether a commoner could be impeached for a capital offence. The Commons impeached FitzHarris with the real object of manipulating the exclusion of James II. from the throne. The Lords refused to entertain the impeachment on the ground that they had no jurisdiction to try a commoner for a capital offence. Charles II. thereupon directed the prosecution of FitzHarris in the King's Bench.

The Commons resolved that the action of the Lords in refusing to try the accused was a denial of justice and a violation of the constitution of Parliament, and that if any inferior court tried FitzHarris, it would be guilty of a breach of the privileges of the Commons. Charles II. dissolved Parliament, and afterwards FitzHarris was tried in the King's Bench and then condemned and executed.

In the case of Sir Adam Blair and four others, who were impeached for treason in 1689 for publishing a proclamation of James II., the Lords proceeded with the impeachment, and now it is fairly settled law that the Lords can try a commoner in a capital case.

The last two cases of impeachment were : (1) The impeachment of Warren Hastings (1786) and Lord Melville (1804). At these trials the question arose whether a prorogation or dissolution stopped an impeachment; though it was held that neither did so, yet in both cases statutes were passed legalising the continuance of the trials. This contention was raised in *Danby's Case*.

Impeachment may, perhaps, be said to be now practically obsolete, though it has been talked about in the House comparatively recently and might still be a conceivable remedy in a case, say, of clear corruption which was not discovered in time. But in these days many kinds of misconduct for which impeachment was once the only remedy have been made ordinary criminal offences.

Section 8 of the Act of Settlement provides that a pardon under the Great Seal cannot be pleaded by way of defence to an impeachment of the Commons. The King can, however, pardon after the Lords have passed sentence, and this was done in the case of three lords who were impeached and sentenced after the Rebellion of 1715.

This section in the Act of Settlement arose out of the case of Danby, who was impeached in connection with a letter written by him to the English ambassador at Versailles at the express command of Charles II., who wrote on the letter: "This letter is writ by my Order.—C. R." (e).

Private Bills. The proceedings on a private bill are partly legislative and partly judicial. Private bills involve hearings by committees of both Houses at which counsel can be heard and witnesses may be examined.

Miscellaneous judicial functions of either House.—Again, where public legislation is contemplated, e.g., in the case of the Money-lenders Act, 1900, a commission consisting of a committee of the Commons or the Lords may be appointed to which witnesses can be summoned and made to answer questions on pain of contempt, another exercise by Parliament of functions resembling those of a court of law.

Again, on the contemplated removal of a judge or, say, the

(e) *Danby's Case* involved the following constitutional questions: (1) Whether a Minister of the Crown can shield himself by pleading the express command of his Sovereign; (2) Whether the Lords can deny justice when a man is impeached; (3) The right of pleading the royal pardon by way of defence; (4) The right of the bishops to be present at the trial before the Lords of a capital offence provided they retire before verdict given. The Commons objected to the presence of the bishops on the ground that final judgment frequently depends on preliminary proceedings.

Comptroller and Auditor-General, when an address is to be presented to the Crown by both Houses of Parliament, the duties of either House are semi-judicial.

When either House is considering a proposed committal for contempt they exercise a function purely judicial. Perhaps, also, the functions of the Speaker alone, or the Speaker aided by members of the Chairman's panel under the Parliament Act, 1911, are also purely judicial.

CHAPTER XXVII.

PARLIAMENT AND THE CROWN.

The King's prerogatives as to Parliament.—It is the prerogative of the Crown to summon Parliament, to prorogue Parliament, and to dissolve Parliament. The Royal Proclamation which dissolves one Parliament summonses another (Anson, vol. 1, p. 51; Todd, vol. 1, p. 57).

On the accession of a new Sovereign, Parliament is to assemble without delay (see May, *Parliamentary Practice*, 11th ed., p. 41; 6 Anne, c. 7, s. 4).

In medieval times, as we have seen, certain Sovereigns pleased themselves as to whether they would convene Parliament, though as early as Edward III.'s reign, a statute provided that Parliament be convened annually, or oftener if need be.

In the reign of Charles I. the Long Parliament passed an Act (repealed *temp.* Charles II.) enabling the Lords to convene Parliament should the King omit so to do for three years. If the Lords, moreover, omitted to call Parliament the constituencies were to be at liberty to summon it (Langmead, p. 457).

In the reign of Charles II. a statute passed to the effect that the sitting of Parliament should not be discontinued for over three years, and in the reign of William III. another statute was passed to the same purport and effect. The Bill of Rights states that Parliament is to be summoned frequently, but the real security of the nation consists in the following facts: (1) that the Army Act, which has to be re-enacted annually, would lapse, and (2) that the levying of certain taxes would be illegal.

It is necessary to keep Parliament in almost constant session in order to satisfy the demand for fresh legislation.

The existence of Parliament is terminated by—

- (A) effluxion of time, to wit, five years, under the provisions of the Parliament Act, 1911; or
- (B) by a dissolution.

A dissolution brings a Parliament to an end; prorogation terminates a session.

Bills in progress have their careers checked by a prorogation, and must be introduced *de novo* in the next session or else abandoned. Impeachments and appeals to the House of Lords are not now affected (see May, 10th ed., p. 43) (a).

Parliament and the demise of the Crown.—In old days Parliament expired when the King died. 7 & 8 Will. III. c. 15 provided that Parliament shall not expire till the King had been dead six months, unless the new King chose to dissolve it. Now, by the Representation of the People Act, 1867, the death of the King is not to affect the existence of Parliament at all. As to demise of the Crown during a general election, see 37 Geo. III. c. 127.

Dissolution.—Though the King can dissolve Parliament when he likes, his conduct, though legal, would be unconstitutional if he did so without the consent of his Ministers. As to when it is constitutional to dissolve, see Anson, vol. 1, p. 293. Parliament is dissolved by a Royal Proclamation issued with the advice of the Privy Council (Ilbert, Manual of Procedure, p. 4).

Adjournments.—Either House may adjourn its sittings for any given number of hours, days, weeks, or even (in modern times) months, but the Crown possesses a statutory power to order resumption of business when both Houses stand adjourned for more than six days (37 Geo. III. c. 127, amended by 33 & 34 Vict. c. 81).

King's visits to Parliament.—The King is not supposed to visit Parliament officially save on stated solemn occasions. He attends at the commencement and close of Parliament and a parliamentary session. He can also personally attend Parliament to assent to laws. The Speech from the Throne at the opening of the session, after dealing with foreign relations and other matters of national importance, indicates the Government

(a) Under the Triennial Act of William III., Parliament was to last for three years, unless sooner dissolved by the Crown.

programme of legislation, while the Speech when Parliament is prorogued sums up the legislative results of the session. The King has not refused his assent to a bill of the Imperial Parliament since the reign of Queen Anne, and the exercise of this prerogative to-day would be unconstitutional.

Modes of giving the Royal assent.—The royal assent is now almost universally given by royal commission under 33 Hen. VIII. c. 21. Should the King refuse his assent, the words "*Le Roy s'avisera*" would be used. When the King assents to a public bill the words "*Le Roy le veult*" are used. For a private bill the words "*Soit fait comme il est désiré*" are used, and for a money bill the following, "*Le Roy remercie ses bons sujets, accepte leur b n volence, et aussi le veult*" (Anson, vol. 1, p. 313; May, p. 512, 11th ed.).

It is contrary to parliamentary etiquette to *import the name of the Sovereign into debate* in order to influence either House; neither is a member permitted to speak in slighting terms of his Sovereign (Ilbert, Procedure, p. 127).

CHAPTER XXVIII.

CONVENTION OF A NEW PARLIAMENT—OPENING OF A NEW SESSION.

When in pursuance of a Cabinet decision the Crown is advised to dissolve, a Proclamation is published dissolving the existing Parliament. This is followed by the Order in Council (heralded by the Proclamation) enjoining the issuing of writs to the temporal and spiritual peers and returning officers, and a separate Proclamation directing the election of sixteen representative peers of Scotland to serve during the ensuing Parliament. The Clerk of the Crown in Chancery then prepares writs, which on being sealed are sent to the following persons, viz. :—

1. Temporal peers of the United Kingdom, who are summoned on their faith and allegiance.

2. The twenty-six spiritual peers, who are summoned on their faith and love. Their writs contain a “*praemunientes clause*,” bidding them bring also archdeacons, deans and representatives of their clergy; this, however, they do not now do.

3. The twenty-eight Irish peers, elected for life.

4. The judges, the Attorney-General, the Solicitor-General, and the King’s ancient Serjeant. These functionaries take no part in the debates of the Lords, but merely give advice. They are summoned to treat and give counsel.

5. Returning officers. The returning officer of a county is the sheriff, and of a borough is the mayor (cf. Anson, vol. 1, p. 53; Ency. Laws of Eng., vol. 12, p. 707).

Meeting of new Parliament.—On the appointed day each House assembles in its own chamber until the Gentleman Usher of the Black Rod requires attendance of the Commons at the bar of the Lords. As many members as space permits then proceed with the Under-Clerk of Parliament (Clerk to the House of Commons) to the bar. The commission for opening Parliament is then read, unless the Sovereign is present, which would render a commission unnecessary (see May, ed. 11, p. 146).

When this has been done by the Lord Chancellor, the Commons are bidden by him to retire and proceed to the election of a Speaker. The Clerk of the House then takes the chair and a Speaker is elected, and this ends the day (*id.*, p. 197).

After the election the new Speaker proceeds with the Commons to the bar of the Lords. He announces his election, which is confirmed by the Lord Chancellor in the name of the Sovereign. After this the Speaker claims certain ancient privileges of the House (see *post*, pp. 290 *et seq.*). The King, if present, reads his speech; if he is absent his speech may be read for him by the Lord Chancellor; or he may choose to read it himself on a future day. After this the Commons retire, and each member of either House proves his right to membership. Then members of both Houses either take the statutory oath or affirmation, as the case may be, of allegiance (as to oath, see Parliamentary Oaths Act, 1866, and as to affirmation, see Parliamentary Oaths Act, 1888).

New session.—At the beginning of each session (including, of course, the first), on the return of the Speaker from the Lords, the usual sessional orders are moved and a bill is read formally the first time. The Speaker then reads a copy of the King's Speech to the House, and an address of thanks to the Crown for the speech is moved and seconded. On that question amendments may be moved, and a general debate on the address takes place, in which the Government programme is discussed and criticised (May, *Parliamentary Practice*, 11th ed., pp. 149 *et seq.*; Anson, pp. 42-67; Ilbert, *Manual of Procedure*, ch. 1, 2).

Parliamentary oaths.—The passing of the Parliamentary Oaths Act, 1888, was due to the efforts of Mr. Bradlaugh.

This gentleman, in 1880, was returned as member for Northampton. He avowed his disbelief in God, and claimed the right to affirm instead of taking an oath which would not bind his conscience. He was permitted to affirm by a provisional order, subject to the risk of an action, and was then sued by one Clarke, a common informer, for £500, because he sat and voted without having taken the oath of allegiance. The court held that the law had been broken (*Clarke v. Bradlaugh*, 7 Q. B. D. 38, C. A.). Mr. Bradlaugh then tried to take the oath (Anson, vol. 1), but

this was not permitted by the House, which passed a resolution to that effect.

In February, 1884, Mr. Bradlaugh administered the oath to himself in the House, and then voted at a division.

This was followed by an action by the Attorney-General, when the penalty of £500 was recovered, and the court decided that as Mr. Bradlaugh was an atheist the self-administered oath was no oath (*Att.-Gen. v. Bradlaugh*, 14 Q. B. D. 667, C. A.).

In January, 1886, Mr. Bradlaugh was returned a member at the new Parliament; and on a motion being made that he should not be permitted to take the oath, the Speaker held that the old resolution of a former Parliament did not bind the new one, and the second motion was not carried. In 1888 the Parliamentary Oaths Act was passed, which permitted an affirmation instead of an oath (Anson, vol. 1, pp. 87 *et seq.*; May, 11th ed., pp. 160 *et seq.*).

The removal of tests in the case of Members of Parliament has been a slow process. Formerly a member had to take the oath of supremacy, the oath of abjuration, the oath of allegiance, and also to make a declaration against transubstantiation. Quakers were the first persons to get relief, then came the Catholic Emancipation Act of 1829, and finally provision was made for Jews in 1858. In 1866 the Parliamentary Oaths Act of that year substituted a simple oath of allegiance for the three oaths, and now, under the legislation of 1888, there is no necessity for any religious belief.

Professor Maitland contends that Nonconformist Protestants were never actually excluded from the House (Constitutional History, p. 364).

Evidence of right to membership.—In the Lords, Garter King-at-Arms produces a roll of peers entitled to be summoned as lords of Parliament. Each peer places his writ on the table of the House, and a new peer hands his patent of nobility to the Lord Chancellor, kneeling as he does so. An hereditary peer does not require an introduction, nor does an elected Irish peer, but a newly-created peer must be proposed and seconded (May, ch. 7). The certificate of the Lord Clerk Register's return

of Scotch peers is evidence of a Scotch peer's right to sit in the House.

The book of returns of elected commoners entitled to sit in the lower House, which is made out by the Clerk to the Crown in Chancery, is evidence of the right of each commoner to sit (May, pp. 150 *et seq.*).

Where a member, new or old, is elected at a by-election, he must be introduced by two other members (May. p. 176) (*a*).

All members of both Houses must take the oath of allegiance to the new Sovereign on the demise of the Crown.

(*a*) In Dr. Kenealy's case introduction was dispensed with (May, p. 171, note)

CHAPTER XXIX.

OFFICERS OF PARLIAMENT.

House of Lords.

Speaker of Lords.—The Speaker of the House of Lords is usually the Lord Chancellor of England, who occupies the Woolsack. A functionary called the Lord Keeper (a commoner) can be Speaker in the Lords, though this is most unusual. The Speaker of the House of Lords need not be a peer, the Woolsack being notionally outside the limits of the House; and he has, on occasion, been a commoner. For instances in which the office of Lord Chancellor has been held by commoners, see May, *Parliamentary Practice*, p. 189, note 2.

Neither the Lord Chancellor nor the Lord Keeper have the powers of the Speaker for maintaining order in the House. Questions of order are settled by the House itself, and in debate peers address the House and not the occupant of the Woolsack.

On a division the Lord Chancellor votes first, and he has no casting vote.

Chairman of Committees.—This officer takes the chair when the House is in committee. He holds office during the whole Parliament. He also superintends all matters relating to private Bills.

Gentleman Usher of the Black Rod.—This functionary is appointed by Letters Patent under the Great Seal. He is a member of the Royal Household, and sits within the Bar. He executes warrants of commitment, and desires attendance of Commons when necessary. He is assisted by the Yeoman Usher of the Black Rod. The Gentleman Usher is an officer of the Order of the Garter. He derives his name from the black wand, surmounted by a golden lion, which is used as the Mace of the Lords. Black Rod has in his custody all persons detained for

trial by the Lords, either as peers or as the result of an impeachment. He also assists at the introduction of new peers (Ency. Laws of Eng., vol. 2, p. 284; May, 11th ed., p. 199).

The Serjeant-at-Arms.—This official's duties are not arduous. He carries the Mace when the Lord Chancellor enters and leaves Houses (May, 11th ed., p. 199).

Clerk of Parliament.—This functionary keeps the journals of the Lords.

Officers of Commons.

The Speaker.—The Speaker is elected at a new Parliament, though the old Speaker is generally chosen if he has discharged his duties to the satisfaction of the House. The King may refuse to accept the choice of the Commons as to electing a Speaker, but by convention he never does so. When the House is not in Committee, and sometimes on other occasions, *e.g.*, when a royal message is expected or a message from the Lords, the Speaker occupies the chair. When in the chair he maintains order and names members guilty of disorder. He gives rulings as to procedure. He signs warrants of committal for contempt and reprimands members and others when necessary. He signs warrants for by-election writs, and when he is absent certain other selected members do this duty for him. On all State occasions he can claim the escort of a life-guardsman, and when he attends a levée he can drive in the centre of the Mall. He has an official residence and a salary of £5,000 per annum. He can claim from the royal forests a buck and a doe twice a year. On retirement it is customary to bestow on him a peerage and a pension (Ency. Laws of Eng., *sub tit.* "Speaker"; see also May. pp. 191-195).

Under-Clerk of Parliament.—This office is worth £2,000 per annum, and the appointment is by Letters Patent under the Great Seal. When the Commons retire to elect a Speaker, the Clerk of the House occupies the chair. He makes entries of what transpires in the House, and from these materials prepares the journals. He endorses bills sent up to the Lords.

The Serjeant-at-Arms is appointed by Letters Patent under the Great Seal. During session he attends the Speaker when the

latter enters and leaves the House. His duty is to carry out directions for maintaining order, and arrest strangers who have no business in the House. He executes warrants for contempt, and when ordered to do so brings persons in custody before the Bar of the House. He or his assistants serve processes of House. When a person is arrested by order of the House he keeps the prisoner in his custody till arrangements are made elsewhere (Ency. Laws of Eng., *sub tit.* "Serjeant-at-Arms"; cf. May, p. 204).

Chairman of Ways and Means.—This official, who has a salary of £2,500 a year, takes the chair when the House is in committee, and acts as Deputy-Speaker when necessary. He maintains order in committee, and can name members; but where a suspension is necessary the Speaker reoccupies the chair. The closure can be applied by the chairman in committee. He has important duties in conjunction with the chairman of committees of the Lords as to private bills. There is a deputy-chairman, with a salary of £1,000 a year (cf. May, p. 604).

Government and Opposition Whips.—The Government Whips consist of (1) the patronage secretary to the Treasury, who interviews members as to patronage in Premier's gift, and acts as a kind of intercessor on occasion; (2) the junior whips, who are junior Lords of the Treasury, but who do only routine work there.

It is the duty of the whips, whether acting for the Government or not, to see that their party is duly represented at a division. They must know their men by sight, keep them within sound of the division bell, and muster so far as possible their full strength in a division. When an important debate is pending, the whips have to do with the order of the speeches, and sometimes have to get a member to continue speaking till they can bring up their forces. They also keep their leaders posted as to the state of feeling in the party. They also act as intermediaries between the leaders of the party and the local organisations, and can pass the word down that the candidature of a given person is or is not to be supported (for particulars about local organisations of a party, see Lowell's *Government of England*, vol. 1, pp. 466 *et seq.*).

CHAPTER XXX.

THE HOUSE OF LORDS.

Origin of the Peerage; Powers of King to create Peers.—The Saxon Witan was not a council of wise men, but of the chief men of the State.

It was not so much an assembly of nobles by blood (eorls), as of thanes; the word “thane” comes from “thegnan,” to serve, and denoted those great men who were useful to the King in war or otherwise.

With the Conquest the personal monarchy gave way to the territorial, and the chief men of the kingdom were among the number of tenants *in capite*, and were known as the greater barons. The land for the most part in England belonged to the King in a more marked degree after the Conquest.

According to Magna Charta, the greater barons (*majores barones*) were summoned to the council or the army by a special writ of summons, whilst the lesser barons were summoned in batches (*in generali*) through the various sheriffs of counties.

Both greater barons and lesser were tenants in chief of the King, and all the King's tenants had a supposed right to attend the Magnum Concilium, as the feudalised Witan of the Norman and early Plantagenet Sovereigns was called. There are various theories current as to what entitled a man to a special writ of summons.

The lesser baron was in the ancient sense a baron also, the word “baro” originally meaning man, and the King's tenants being known as King's men; but by degrees only the holder of a baronia—*i.e.*, 13½ knights' fees—was considered as a baron. Barony, in early times, depended on tenure and nothing else; and long after this ceased to be the case the old notion prevailed. When barony ceased to depend on tenure has formed the subject-matter of much academic discussion.

There are several theories as to this. Camden, judging from his "*Britannia*," appears to think that Henry III., owing to the turbulence of his barons, summoned to his Great Council only the more worthy of this class. He says: "*Ad summum honorem pertinet ex quo rex Henricus III. ex tantâ multitudine quae seditiosa et turbulenta fuit, optimos quosque rescripto ad comitia parliamentaria evocaverit. Ille enim (ex satis antiquo scriptore loquor) post magnas perturbationes et enormes vexationes, inter ipsum regem, Simonem de Montforti et alios barones, motas et susceptas, statuit et ordinavit quod omnes illi comites et barones regni Angliae quibus ipse rex dignatus est breviam summonitionis dirigere, venirent ad parliamentum suum, et non alii; nisi forte dominus rex aliam (vel similia) breviam eis dirigere voluisset*" (Camden's *Britannia*; Cruise on Dignities, p. 15).

Selden, according to Cruise, disparages this explanation; but considers that even in the time of John tenure *in capite* of a baronia might not have entitled the holder to a summons as a matter of course (see Cruise, p. 15).

Maitland remarks that the holder of a "*baronia*" had a supposed right to be summoned, and had to go if summoned; but that the King did not observe the rule rigidly, one of the results being that barons had to go whose estates did not amount in value to a baronia; and Pollard says that the receipt of summons depended on the discretion and caprice of the King; to the Parliament of 1295, he adds, forty-one barons only were summoned, to that of 1300 ninety-nine barons were summoned, and to that of 1322 Edward II. summoned fifty-two barons (Pollard, *Evolution of Parliament*, p. 99).

Stubbs thinks that any tenant *in capite* could be specially summoned; whilst Anson thinks that anyone could be summoned, baron or no baron, and his view is supported by the authors of the report on "*The Dignity of a Peer*," and also by Hallam (see also Pollard, p. 99).

Whatever the qualification was for a special writ before the middle of Edward I.'s reign, it is probable that at the date of Edward I.'s Model Parliament (1295)—

- (1) The King could not refuse a summons to a man who had once received one (Stubbs, vol. 2, p. 182).

- (2) That if a man was summoned to Parliament by special writ, his heir had a right to a summons after his death (*ibid.*).
- (8) The making of the status of the peer depended on the hereditary reception of the writ rather than on the tenure, which had been the hereditary qualification of the summons (*ibid.*), before a man could attend Parliament.
- (4) A royal summons was necessary (Cruise, p. 40). The peerage, like the Crown, became hereditary owing to close association with land, and when once the hereditary principle was established, it was continued, the King's opposition to an hereditary nobility being overcome. Pollard is doubtful as to when it was established.

In the *Clifton Case* it was held that where a man receives a summons, and takes his seat, his blood becomes ennobled, and he acquires an hereditary peerage (Palmer's Peerage Law in England, p. 139).

The taking of the seat in obedience to the summons was, however, an essential. In 1677 Lord Freschville claimed a more ancient peerage than he then possessed, alleging that he was the heir of the body of Ralph de Freschville of Staveley, but he failed in his contention, as there was no evidence that Ralph de Freschville had ever taken his seat. The above case shows that lapse of centuries does not prevent a man claiming a peerage.

Mr. Round states that the *Freschville Case* broke down because the claimant's ancestor was not summoned to a proper Parliament (Round's Peerage and Pedigree, p. 193).

The taking of the seat may, perhaps, be by proxy, as the following case shows. Thomas Howard, second son of the then Duke of Norfolk, was summoned to Parliament in 1597, and he was unable, owing to sickness, to attend, and Lord Scrope attended as his proxy (Cruise, quoting Camden, p. 72).

Lapse of time is no bar to a peerage claim, and when a man proves that he is the heir of a man who sat as a baron *in pleno parlamento* as a member of the Lords, even so early as the reign of Edward I., he is entitled to the peerage as of right (cf. *Hasting's Case*, West, 621). In the above case the claimant proved that his ancestor sat in a full Parliament (*in pleno parlamento*).

mento) on May 29, 1290, and won his case. Yet in the *St. John Case* the claimant, who proved that his ancestor sat in the same Parliament of 1290, lost his case on the ground of its not being a full Parliament, since the knights of the shire did not attend till the following July (*St. John Case*, [1915] A. C. 282). These two cases are conflicting, and they are both of equal rank, though the *St. John Case* will probably be followed. They illustrate the fact that a decision of the Committee of Privileges need not be followed on future occasions like a decision of the House of Lords on appeal.

Though there is ground for supposing that the King could, in early times at least, refuse a writ of summons to certain of his greater barons, it is doubtful when he acquired the right to summon anybody he chose, baron or no baron, or, rather, tenant or no tenant.

Epochs in the history of the Baronage.—Baronies were created successively (1) by tenure, (2) by writ, (3) by patent. *Barony by tenure* was unpopular with the King. The idea, in spite of this, was slow in perishing, as the following cases will show. In the *De Lisle Case* (Palmer, 181) it was claimed that Henry VI. had granted a charter to one John Talbot, his heirs and assigns, for ever, being tenants of the manor of Kingston Lisle. It was recited in this charter that one Warren de Lisle and his ancestors had from time immemorial sat as Barons De Lisle by reason that they held the manor of Kingston Lisle. This claim—one to a barony by prescription, rather than by tenure—succeeded. In the *Abergavenny Case* (1604) there were two claimants: Sir Thomas Fane, who claimed a barony by writ in right of his wife, the only daughter and heiress of the then late Lord Abergavenny, and Sir Thomas Neville, the nephew and heir male of the said lord, and he claimed by tenure. The legality of Neville's claim was not gone into seriously owing to a compromise whereby Neville got the barony of Abergavenny and Fane the peerage of De Spencer. In the *Arundel Case* (Palmer, 179) Sir John FitzAllan claimed the title of Earl of Arundel by reason that his ancestors sat in the House as lords of the Castle of Arundel, whereunto the title was united and annexed; and that the said castle was then in his possession. This claim of barony by

tenure succeeded. The first decisive case against barony by tenure was the *FitzWalter Case*, where the claimant by tenure lost the day, the Committee of the Privy Council (a) being of opinion that barony by tenure was obsolete and not fit to be revived. The illegality of barony by tenure was finally set at rest by the *Berkeley Case* (1811), 4 Camp. 401, wherein the claimant by tenure failed, the Committee holding that (1) barony by tenure transgressed the principle that the King is the fountain of honour, because if a peerage were attached to land the alienee of the land could claim it; (2) barony by tenure is inconsistent with the theory of hereditary nobility; (3) it is of the essence of a peerage that it is inalienable; (4) a right to a peerage is evidenced by the records of the House, its traditions, usages, and precedents, whereas if it was alienable the right thereto must be determined by courts of law. It is needless to enquire what was the position of a baron before 1295, and subsequent to that date there is no evidence of anyone coming to sit in Parliament without a writ of summons.

Degradation of peers.—This used to be effected by an Act of Attainder, and of course can be so effected now, but these Acts have long been obsolete. According to Blackstone, a peer cannot lose his nobility but by death or attainder. In the reign of Edward IV. Neville, Duke of Bedford, was deprived of his title owing to poverty, but an Act was deemed necessary (b).

Right to a writ of summons to Parliament.—It is very doubtful whether the King can refuse a writ of summons to Parliament. The point arose in the *Bristol Case*. Charles I., to protect Buckingham, refused a summons to Lord Bristol. Bristol complained to the Lords of this violation of privilege, and as that assembly exercised pressure on his behalf, Charles I. issued the writ, which was duly served, but informed Bristol in a private letter not to avail himself of it. This letter was laid on the Table

(a) This case was referred to the Privy Council by the King instead of to a Committee of Privileges in the Lords, and it illustrates the King's power to refer a question of an old peerage to any tribunal he chooses. In this case he chose the Privy Council, perhaps in order that the claimant should not be inconvenienced by a long intermission of the holding of Parliament.

(b) As to knighthoods the King can degrade, as Roger Casement was deprived by the King of his title after being convicted of treason.

of the Lords, and the following day Bristol was charged with treason. Bristol retaliated by procuring Buckingham's impeachment, and Charles, to save his favourite, dissolved Parliament. During the recent war writs of summons were not sent to the Dukes of Cumberland and Albany on the ground that they were German sovereigns, and this course was adopted without a statute, though some time afterwards an Act was passed excusing the informality.

Alienation and surrender of peerages.—According to Prynne, who is now discredited by Anson and other authorities, peerages could be surrendered and even alienated. It has now, however, been settled that these dignities are incapable of surrender (see Redesdale Committee, 1st Report, p. 397). But in medieval days instances occur of surrenders with the King's consent. Coke says "he heard Lord Burghley vouch a record of the reign of Edward IV. that Lord Hoe, having no issue male, by deed granted his dignity over, but not having the King's license, the same was in Parliament adjudged void" (Cruise, p. 111). The power of alienating dignities appears to have almost ceased in the time of Henry VI. In the case of the barony of Lisle the gift of the land, to which the dignity had been annexed by the Countess of Shrewsbury, does not appear to have conferred on the donee a complete right to that dignity, for letters patent were also obtained in order to confer the baronage on him (Cruise, p. 111). In the *Ruthyn Case* (1640) it was held that a peerage must originate in matter of record, and the Lords after this case resolved "that no person that hath an honour may alien or transfer that honour to another person" (*ibid.*). This resolution has been criticised as contrary to history (Round, *Peerage and Pedigree*), and the law may be said now to rest on the *Berkeley* and *Norfolk Cases*. Cruise (p. 113) gives several instances of surrenders of baronies to the Crown, and he says that Simon de Montfort, the youngest son of the Earl of Leicester, *temp.* Henry III., surrendered his title to the King, who made a regrant thereof. In 1660 Lord Purbeck surrendered all his dignities to the King. In the *Norfolk Case* (1907) Lord Mowbray claimed the earldom of Norfolk under the following circumstances: In 1302 Roger Bygod, Earl of Norfolk, surrendered his earldom to

Edward I. In 1312 Edward II. granted this earldom to one Brotherton and the heirs of his body. Brotherton was summoned to Parliament and took his seat, and Lord Mowbray claimed as Brotherton's heir the earldom, which had fallen into abeyance. The Committee held that Bygod's surrender was invalid, and that the fact of Brotherton sitting in Parliament under the King's writ did not create an earldom. The legality of this decision appears to rest on the Report of the Dignity of a Peer (3rd Report, vol. 2, pp. 25, 46).

Finally, it is clear that no peer can surrender his peerage : such surrender would be unprecedented and irregular ; though it is difficult to state the exact extent of the prerogative as to this.

Nevertheless, up to the days of the Stuarts, and even up to the celebrated *Berkeley Case*, the idea, though discouraged frequently by decisions of Committees of Privilege, did not perish utterly (Palmer, 183).

Restrictions on the Crown's right to create peers :—

(1) The King cannot create a man a peer of Scotland, as the Act of Union does not provide for this contingency.

(2) By the Act of Union with Ireland, 1800 (c. 67), s. 4, one new Irish peer may be created for every three becoming extinct until the number of such peers falls to one hundred, and in order to keep up the number of peers who do not hold hereditary peerages of the United Kingdom up to one hundred, the King may create fresh peers up to that number if he chooses to do so.

(3) The King is restricted as to the creation of lords spiritual, as follows :—

Only twenty-six prelates are allowed to sit in the Lords. The two Archbishops and the Bishops of London, Durham, and Winchester are immediately on appointment Lords of Parliament, but other bishops have to wait their turn, according to date of appointment, before they become entitled to a writ of summons. Most of the statutes founding new bishoprics contain provisions that the number of lords spiritual shall not be increased.

Before the disestablishment of the Irish Church in 1869 one archbishop and three Irish bishops had seats in the Lords by

virtue of the Act of Union, but the Irish Church Act, 1869 (c. 68, s. 5), abolished the right of these prelates to be summoned.

(4) It has now been universally held that the King cannot grant a peerage which descends in a manner unknown to the law, but there was a time when a contrary view prevailed. In the *Devon Case* it was held that the grant of honours is not regulated by the same laws as the grant of land, and, therefore, where the Crown granted a peerage to a certain man *et hæredibus suis masculis in perpetuum*, and the grantee died without issue, the title was held to descend to the male heir of a collateral branch of the family. The Lord Chancellor remarked that the Crown was the fountain of honour and that such fountain was inexhaustible. He also quoted as a precedent the case of Lord Scrope in the twenty-first year of the reign of Richard II.

The Lord Chancellor also remarked that in the third year of Charles I. a peerage granted to a man *et hæredibus suis tam de latere quam de corpore*, was held good, though that was a limitation which would clearly include collaterals.

In the *Wiltes Case* (1862), 4 H. L. Cas. 126, however, it was held that a grant of a peerage to a man and his heirs male was bad because "the Crown cannot give to the grant of a dignity or honour a quality of descent unknown to the law." These two cases contradict one another, but the *Buckhurst Case* (1876), 2 App. Cas. 1 may be considered as settling finally the law on the subject. In this case Lord Cairns stated that "a peerage partaking of the qualities of real estate must be made in its limitations by the Crown, so far as it is descendible, descendible in a course known to the law" (see Palmer, p. 91).

(5) *The King cannot at common law create life peers.*—There are two points as to the King's power to consider: (1) Can the King make any man or any woman a peer for life? (2) Can the King by making any man a peer for life confer on that man a right to sit and vote in the House of Lords? As to the first point, Lord Coke says, in his *Commentary on Littleton*, that the King can make any man or any woman a peer for life. Blackstone says: "The King may create either men or women noble for life." Selden agrees with Lord Coke, and so does Comyn.

In the *Abergavenny Case* the opinion of Lord Coke was endorsed. The question of the King's ability to create life peers was raised in the *Wensleydale Case* (1856), 5 H. L. C. 958, where it was held that, though the Queen might have power by virtue of her prerogative to make any man or woman a peer or peeress for life, yet such grant could not confer on the grantee a right to sit and vote in the House of Lords.

In the course of the proceedings the Barony of Hay was mentioned, where, though the right of the Crown to confer on Lord Hay a title of honour was clearly admitted, yet the patent distinctly excluded him from sitting and voting in the Lords (*ibid.*, p. 963). During the proceedings Lord Campbell stated that the House had a right of its own authority to enquire into a new patent, though it might have no power to examine into the claim of an old peerage except upon reference from the Crown. This *dictum* may be considered sufficient to settle the question that the King by his prerogative can refer old peerage claims to any tribunal he chooses, and of this the FitzWalter peerage forms an instance. But, conventionally speaking, the King is bound to refer these cases to the House of Lords, who, in their turn, depute a Committee of Privileges to enquire into the matter and report to them.

It is noteworthy fact that the *FitzWalter Case* was originally referred to the Lords, where it was actually heard, though no resolution was passed. It was subsequently referred by the King to the Privy Council owing to the prorogation of Parliament (Cruise, p. 117).

Peerages are classified according to their date of creation as follows: Peers whose peerages were created before the Union with Scotland in 1707 are peers of England. Peers whose peerages were created between 1707 and 1801 are peers of Great Britain, whilst those whose peerages were created after 1801 (Union with Ireland) are peers of the United Kingdom (Ilbert, Parliament, p. 198).

Classes of peers.—These classes are: (1) Temporal hereditary peers of England holding English peerages. (2) Spiritual English peers. (3) Sixteen Scotch elected peers. (4) Twenty-eight Irish

life elected peers. (5) Lords of appeal in ordinary, who are life peers.

Peers of realm not necessarily lords of Parliament.—A person can hold a peerage without being a lord of Parliament, *e.g.*, an unelected Scotch or Irish peer, or a peeress in her own right. Many Scotch and Irish peers also hold what are popularly called English peerages.

Again, an infant or a bankrupt peer cannot sit in Parliament.

Various lords of Parliament.—Of lords of Parliament some hold during tenure of office, others for life, and others again are hereditary peers. A bishop on retirement loses his seat, but a lord of appeal retains his seat during his life.

If a lord of appeal retires, he remains a lord of Parliament (50 & 51 Vict. c. 70, s. 2).

Grades of peers.—There are various grades of peers, viz., dukes, marquises, earls, viscounts and barons.

Dukes.—The word “duke” comes from the latin *dux* (general). As the first Norman kings were dukes of Normandy, they did not relish making a subject a duke. Edward III. gave the first dukedom to his son, the Black Prince, and till the time of James I. all dukes were kings’ descendants. In the days of Elizabeth there were no dukes, but her successor made one, Villiers Duke of Buckingham, and this man was the first duke not of royal blood. A dukedom is the first grade of nobility, but at functions dukes take a lower precedence than certain high dignitaries who hold office (Stephen, Commentaries, 14th ed., vol. 2, p. 578).

Marquises.—Like the word “duke,” the word “marquis” betokened an office-holder, the special function of a marquis being to guard the Scotch and Welsh marches, or frontiers. The term now is a pure title of honour, and has been so since Richard II.’s time, when one Vere was created Marquis of Dublin (*id.*, p. 579).

Earl (ealdorman).—The earl was formerly head of a shire. In Norman times the title was changed to “comes” or count, but the ancient title was afterwards reverted to. An earl’s wife, however, is still styled a countess (May, 11th ed., pp. 8, 9).

Earls used to be invested, a belt being buckled round the waist, and then a sword was attached to the belt. Hence the expression “belted earl.”

Viscount.—The word “viscount” comes from the “vice-comes,” or sheriff, who presided at the county court when the bishop and ealdorman ceased to attend.

Barons.—This is the lowest grade. For these, see *ante*, p. 269.

Peeresses.—When a peeress in her own right contracts a marriage with a commoner she retains her title and dignity, but a peeress by marriage on afterwards marrying a commoner loses her rank, which is both gained and lost by marriage (Stephen, vol. 2, p. 585), but by courtesy she usually retains her title (c).

A peeress of higher degree by intermarriage with a peer of a lower grade does not lose her title, but she loses precedence; thus, where a dowager-duchess became Lady Portmore by a second marriage she was refused precedence as a duchess at George III.’s coronation (Stephen, 11th ed., vol. 2, p. 640) (d).

Scotch peers.—Sixteen Scottish peers, who are not peers of the United Kingdom, are elected to each Parliament. The royal proclamation which directs the election bids the Scottish peers assemble at Holyrood to choose their representatives. The Lord Clerk Register presides, and when the election is over forwards the list of elected peers to the Clerk of the Crown in Chancery. See the procedure at the election fully described in Anson, vol. 1, p. 219.

(c) Where there are two co-heiresses entitled to a peerage, the King chooses which is to have the title.

(d) Until the *Willoughby Case*, a man who married a peeress in her own right had a seat in the House of Lords for life by the curtesy (Collins, p. 11).

As the Act of Union does not provide for the creation of fresh Scotch peers, the Crown cannot make a man a Scotch peer, though it may nullify an attainder, and thus perhaps purify corrupted blood.

When a Scotch peer is created an English peer, such Scotch peer loses his electing power as a Scotch peer (*vide* Resolution of Lords in 1787), but no vacancy is created (May, 11th ed., p. 11).

Irish peers.—As to creation of Irish peers, see *ante*, p. 277.

When one of the twenty-eight Irish peers, who are elected for life, dies, the Lord Chancellor despatches to the Irish Lord Chancellor a mandate directing the preparation and subsequent issue of voting papers. The Irish Clerk of the Crown gets ready these voting papers and transmits them in duplicate to each Irish peer entitled to vote. During the thirty days of the poll the Irish peers take the oath of allegiance and transmit the necessary documents to the Irish Crown Office. The peer with the largest number of votes is elected, and where the votes are equal a lot is cast, the name drawn by the Clerk of Parliaments winning the election.

Lords of appeal in ordinary.—These lords are selected under the Appellate Jurisdiction Act, 1876. They act as permanent judges in the House of Lords in its appellate capacity.

They receive £6,000 per annum whilst they act as judges. Like other judges, they are removable on an address from both Houses, but they retain their title for life. The qualification for the post is (1) fifteen years' standing as a barrister in England, Ireland, or Scotland; (2) having held high judicial office for two years.

All lords may be present at judicial appeals, but no appeal shall be heard unless there be a quorum containing three at least of the following persons :—

(1) Lord Chancellor.

(2) Lords of appeal in ordinary.

(3) Peers of Parliament who hold or have held high judicial office (Appellate Jurisdiction Act, 1876, s. 5).

The lords can hear appeals during a prorogation and even after dissolution of Parliament (Annual Practice Notes to Appellate Jurisdiction Act, 1876).

In cases of difficulty the lords may at common law invoke the assistance of King's Bench Division judges (Annual Practice).

By convention lay peers do not sit to hear judicial appeals (Stephen, 14th ed., vol. 3, p. 380; Annual Practice).

CHAPTER XXXI.

PRIVILEGES OF THE LORDS.

Judicial privileges.—The privileges and powers of the Lords are either judicial or extra-judicial. The judicial privileges are—

1. Right to act as court of final appeal from the superior courts of law in the three kingdoms.

2. Right to try, as court of first instance, peers and peeresses (including Irish and Scotch peers and peeresses) for treason or felony, and, conversely, the right of a peer or peeress to be so tried (May, 11th ed., pp. 667 *et seq.*).

These rights have belonged to peers from time immemorial, but the first instance of a peeress being so tried occurred *temp.* Henry VI. Whilst Parliament is sitting the accused is tried before the peers, a functionary called the Lord High Steward, who is almost universally the Lord Chancellor, acting as chairman. When Parliament is not sitting the Lord High Steward acts as judge and certain other lords as jurymen (Stephen, Digest of Criminal Law, art. 17).

Though all the lords can demand to attend, spiritual peers do not vote for guilt or innocence, as they must retire after protesting before the delivery of the verdict. A peeress who has intermarried with a commoner loses the privilege of being thus tried, and a bishop does not possess the privilege though (whilst in office) he is a lord of Parliament. Bishops may vote in a non-capital case (*ibid.*, art. 131).

3. The right to try impeachments by the Commons (May, 11th ed., ch. 24).

4. The right to try disputed peerage claims. This last is a semi-judicial privilege only, as lay peers may take part in the proceedings and no quorum of legal peers is necessary. The Attorney-General, however, is usually at the trial to give legal assistance when needed, and there is also almost always, if not always, a law lord or two to help.

A claimant to a peerage first addresses his petition to the Crown. The Crown, on the report of the Attorney-General, refers the matter to the House of Lords, who, in turn, refers it to its Committee of Privileges (Palmer, p. 9).

The Lords have also a statutory right to hear appeals from the Court of Criminal Appeal when the Attorney-General certifies that the case is a proper one to be so heard (Criminal Appeal Act, 1907).

Extra-judicial privileges.—These are as follows :—

1. Freedom of speech (May, 11th ed., p. 96).

2. Freedom from arrest (*ibid.*, p. 103).

This includes civil arrest only. The privilege commences forty days before Parliament sits, and lasts during session and forty days thereafter.

The servant of a peer of Parliament has a similar privilege, but the number of days is twenty and not forty (*ibid.*, p. 111).

3. The right of each peer to demand audience of his Sovereign in order to tender him advice (*ibid.*, p. 61).

4. The right of each peer of Parliament to record a written protest in the journals of the Upper House against a measure disapproved of.

5. The right of each peer to decline to attend in court as a witness on a subpœna. This right is not supposed to be taken advantage of (Anson, vol. 1, p. 226; *ibid.*, p. 111) (a).

6. Right of each peer to vote by proxy. This right has been waived since 1868, according to Sir W. Anson.

7. Exemption from service as a juryman (see Jury Act, 1870) (b).

8. Peers temporal and spiritual *en route* to or from Parliament when passing through a royal forest may kill one of the royal deer without warrant in view of the ranger if present, or on blowing a horn if he be not present, that the peer may not seem to take the royal venison by stealth (Stephen's Commentaries, 14th ed., vol. 2, p. 376).

(a) Where a peer attends court as a witness, he is sworn like anybody else (*in judicio non creditur nisi juratis*).

(b) A juryman who is a peer can have his position challenged by prisoner "*propter honoris respectum*."

9. The right of the Lords to commit for breach of privilege and for contempt. The Lords may commit for a period of fixed duration, but where they do not fix a time, the person committed is released when Parliament is either prorogued or dissolved (May, 11th ed., p. 68).

In the case of Lord Shaftesbury the facts were as follows : Lord Shaftesbury with two other lords were committed by the Upper House for contempts. They applied for release under a writ of *habeas corpus*. The return stated that the prisoners were committed for high contempts, and, no other reason being given, it was contended that the return was insufficient. The King's Bench held that had the case been one of the ordinary kind the return would have been insufficient, but that it could not interfere with a court like that of the Lords.

The prisoners remained in custody, and the following session the Lords voted that the application to the King's Bench was a breach of privilege. Lord Shaftesbury was called on to apologise to their lordships, and, on his doing so, was released.

Judicial notice.—The courts take judicial notice of the privileges of the two Houses of Parliament (Taylor, Evidence, § 5).

Of persons who cannot sit in the Lords.—The following persons cannot sit, viz. :—(1) Peeresses in their own right; (2) infants; (3) felons who have not endured their punishment or been pardoned; (4) outlaws; (5) persons who will not take oath or affirmation of allegiance; (6) misdemeanants during incarceration; (7) bankrupts. No bankrupt can sit or vote in the Lords, or on any committee thereof, neither can he be a Scotch representative peer or an Irish life elected peer, unless the adjudication is annulled or the peer be discharged with a certificate that the bankruptcy was caused by misfortune and not misconduct.

CHAPTER XXXII.

THE LORDS AND COMMONS IN CONFLICT.

There was no serious conflict between the Lords and the Commons till 1407. In this year the Lords voted a subsidy to the Crown, and Henry IV. requested the Commons to send a deputation to the Lords "to hear and report to their fellows what they should have in command from the King to the end that they might take the shortest course to comply with the intention of the said Lords" (Langmead, p. 249). The Commons resented this conduct to such an extent that a rule was made that no report be sent to the King until the money had been voted in both Houses.

In *Floyd's Case* (1621) the Commons tried to exercise criminal jurisdiction outside the scope of their privileges, but abandoned their claim at the request of the Lords. The Lower House had, in the reign of Henry IV., resolved that they had no right to exercise criminal jurisdiction. In 1640 the Commons, led by Pym and Hampden, were desirous that redress of grievances should precede supply, and a committee was appointed to wait on the Lords with a list of grievances. Charles I. wanted the supply in a hurry, and called on the Lords to assist him; the Lords then resolved that supply should precede redress of grievances. The Commons resolved that this was a breach of their privileges as to money votes. In *Skinner's Case* there was a serious controversy as to the claim of the Lords to exercise original jurisdiction in civil cases. The dispute lasted a year and a quarter. For further information see Langmead, 7th ed., p. 585.

In 1671 the Commons successfully resisted the claim of the Lords to reduce a tax. In the case of *Shirley v. Fagg* the Lords successfully upheld their claim to hear equity appeals (Langmead, p. 490).

In 1678 the Lower House passed a resolution that all money

bills must commence in the Commons and that the Lords had no right to alter or amend them. The Lords yielded in this particular instance, but resolved that the right should be reserved to them in future. In the second year of Queen Anne's reign (1704) the Lords and Commons had a very serious dispute over the case of *Ashby v. White and the Aylesbury men*, and the only way out of the difficulty was a prorogation which set free prisoners arrested for contempt.

In 1832 there was a severe controversy over the Reform Bill. The Commons prevailed against the Lords, William IV., much against his inclination, supporting Lord Grey by threatening to use the prerogative right of creating sufficient peers to carry the measure.

In 1860 the Lords exercised their undoubted legal right of rejecting money bills by throwing out a measure for the repeal of the paper duty.

On the motion of Lord Palmerston three resolutions to the following effect were carried in the Commons as to this matter. (1) That the right of granting aids and supplies is in the Commons alone. (2) That, although the Lords could reject money bills, yet the exercise of that power was regarded by the House with peculiar jealousy. (3) That the Commons had the power to impose and remit taxation and to frame bills of supply, and that the right of the Commons as to the matters, manners, measure and time should be maintained inviolate. In the following year, Gladstone being then Chancellor of the Exchequer, the opposition of the Peers was overridden by the insertion of the provision regarding paper duties in a general financial measure for the services of the year. In 1869 the Irish Church Disestablishment Bill was violently opposed by the Lords, but the difficulty was surmounted by Lord Cairns's influence and the clearly expressed wishes of the electorate.

There was considerable friction between the two Houses when the Lords rejected the Representation of the People Bill in 1884.

In this case Queen Victoria intervened and acted as mediator between the disputants. Lord Salisbury on the one hand, and Mr. Gladstone on the other, by their temperate conduct and their readiness to make mutual concessions were instrumental in secur-

ing the passage of a measure which harmonised with popular opinion.

There was another memorable dispute over the rejection of the Army Purchase Bill in 1872. In this case the Commons carried their point by an exercise of the prerogative and without resort to legislation. Purchase was authorised by royal warrant, and the warrant was cancelled. Thus the Government attained their object without a direct conflict between the Commons and Lords.

The next dispute was over Mr. Gladstone's first Home Rule Bill, but as the Lords were in this case supported by the electorate at a general election their position was for the time being maintained.

It was doubtless this event which encouraged Lord Lansdowne to state, as he did in 1906, that it was the duty of the Upper House to reject a measure when there was good reason for supposing that it was unpopular with the electorate or where such measure was carried in the Commons hastily or without sufficient consideration.

In 1905-6 the Liberals returned to power with a gigantic majority, only to find that their principal measures continued to be rejected by the Upper House. In 1907 the Commons passed resolutions to the effect that the veto of the Lords should be curtailed. These resolutions, which indicated the nature and extent of the curtailment desired, afterwards became the basis of the Parliament Act, 1911. In 1908-9 Liberal measures—and notably the Licensing Bill—were again thrown out by the Lords. The climax was reached when the Budget for 1909 was rejected *in toto*. At two general elections in 1910, in both of which the veto was the principal issue, the Liberals were returned with reduced, but still substantial, majorities. After an abortive conference at Buckingham Palace between the leaders of the Government and the Opposition, and in the face of passionate protest and recrimination, the Parliament Act was passed in 1911, the Lords reluctantly yielding after being informed that the King had consented to the creation of a sufficient number of peers to override their opposition.

In effect, the Parliament Act wholly abolished the Lords' veto over money bills, and substituted for their absolute veto over

other legislation a suspensive veto of two years. It further reduced the duration of Parliaments from seven to five years.

The words of the Act are to the following effect : After reciting (*inter alia*) that it was intended to substitute for the House of Lords, as it then existed, a second chamber constituted on a popular instead of an hereditary basis, it was provided :—

(1) That if a money bill having been framed by the Commons and sent to the Lords at least one month before the end of the session is not passed by the Lords without amendment within one month after it has been sent up, the bill, unless the Commons direct to the contrary, shall be presented to the King and become a statute on receipt of the royal assent without consent of the Lords.

(2) A money bill means a public bill which, in the opinion of the Speaker of the House of Commons, contains only provisions dealing with the following topics :—

- (a) Imposition, repeal, remission, alteration, or regulation of taxation.
- (b) Imposition for any financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation of such charges.
- (c) Supply.
- (d) The appropriation, receipt, custody, issue or audit of accounts of public money.
- (e) The raising or guarantee of any loan or the repayment thereof.
- (f) Subordinate matters incidental to the above topics or any of them.

Bills as to rates and other local burdens, corporation loans, etc., are not to be regarded as money bills.

(3) There shall be endorsed on money bills when sent up to the Lords, and when presented to the King for assent, the Speaker's certificate signed by him that a given bill is a money bill, and before so certifying the Speaker is to consult, if practicable, two members to be appointed from the Chairman's panel at the beginning of the session by the Committee of Selection.

(4) If any public bill other than a money bill, or bill containing any provision to extend the duration of Parliament beyond

five years, is passed by the Commons in three successive sessions, whether of the same Parliament or not, and having been sent to the Lords at least one month before the end of the session, is rejected by the Lords in each of these sessions, such bill shall, on the third rejection by the Lords, unless the Commons direct to the contrary, be presented to the King for the royal assent without further consent of the Lords. But the foregoing provision is not to be effectual unless two years have elapsed from the date of second reading in the first of the sessions and the date of its passing the Commons in the third session.

(5) When a bill is presented to the King for assent, the signed certificate of the Speaker that the requirements of the Act have been complied with shall be endorsed thereon.

(6) A bill shall be deemed rejected by the Lords unless passed by them without amendment or with amendments agreed on by both Houses.

(7) A bill shall be deemed identical with a former bill if, when sent to the Lords, it is identical with the former bill, or contains only such alterations as are certified by the Speaker to be necessary owing to lapse of time since the former bill or to represent amendments made by the Lords in the former bill in the preceding session and agreed to by the Commons.

The Commons may, if they choose, in the second or third session suggest further amendments without inserting them in the bill, and such amendments, if agreed to by the Lords, shall be treated as amendments agreed on in both Houses.

But exercise of this power by the Commons shall not affect the operation of this section in the event of rejection of the bill by the Lords.

The Speaker's certificate shall not be questioned in any law court.

When the bill is sent up for the royal assent without the consent of the Lords the enacting formula is as follows :—

Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled in accordance with the provisions of the Parliament Act, 1911, and by authority of the same, as follows, etc.

CHAPTER XXXIII.

PRIVILEGES OF COMMONS—CONFLICT BETWEEN COMMONS
AND LAW COURTS.

Of the nature of privilege.—Candidates for examination are sometimes asked to discuss the dictum: "Privilege is to Parliament what prerogative is to the Crown." This expression means that just as "prerogative" denotes the common law powers which the Sovereign can exercise without help or hindrance from Parliament or the judicial bench, so "privilege" denotes the powers which the Houses of Parliament can exercise without help or hindrance from the same sources.

It is a well-known rule that within the orbit of its privileges either House of Parliament is supreme and that no appeal lies from its decisions.

Privilege, says Lord Denman, is more formidable than prerogative, which must avenge itself by indictment or information, involving the tedious process of law, whilst privilege at one voice accuses, condemns, and executes. Just as the King cannot add to his prerogative, so neither House can create new privileges.

Either House is the sole judge of its privileges where it is clear that a privilege is infringed, but neither House can decide the question whether or not it possesses a given privilege.

Classification of privileges.—These privileges are divided by Sir W. Anson into two classes:—(1) those claimed by the Speaker at the opening of a new Parliament (2) those not so claimed.

The fact of a privilege being claimed by the Speaker carries with it no superior force, for all privileges are of equal validity. The privileges claimed by the Speaker are:—(1) Freedom of speech; (2) freedom from arrest; (3) access of Commons to Crown through the Speaker; (4) that the Crown will place the most favourable interpretation on the deliberations of the Commons

(May, 11th ed., p. 59). The privileges not claimed by the Speaker are :—

1. Right of Lower House to regulate its own constitution (Anson, vol. 1, 4th ed., p. 162). This includes the right to settle disputed elections, and to pronounce on the legality of an election and on the legality of qualifications for membership. It includes also the right to suspend and expel members (Anson, vol. 1, 4th ed., p. 178; cf. May, 11th ed., p. 52).

2. Right to take exclusive cognisance of what transpires within its own walls (Anson, vol. 1, 4th ed., p. 174; *Bradlaugh v. Gossett*, post, 12 Q. B. D., p. 281).

3. Right to punish members and outsiders for contempt as any other court of record can (May, 11th ed., p. 83; Anson, 4th ed., vol. 1, p. 147).

4. Right of impeachment, see p. 255, and May, 11th ed., c. 24.

5. Right to control finance and initiate financial legislation (see Chap. XXXV.).

Freedom of speech.—Freedom of speech was first demanded by the Speaker in 1541 (Anson, vol. 1; cf. May, 11th ed., p. 96).

Freedom of speech, says Mr. Taswell-Langmead, is the essential attribute of every free legislature, and may be regarded as inherent in the constitution of Parliament. Quoting *Elsynge*, the learned writer continues :—"The Commons under Edward III. debated amongst themselves many things concerning the King's prerogative, and agreed upon petitions for laws to be made directly against his prerogative, as may appear by divers of the said petitions, yet they were never interrupted in their consultations nor received check for the same" (Langmead, 5th ed., p. 268).

The proceedings against Haxey for treason when he introduced a bill for the curtailment of Richard II.'s household expenses were the cause of Henry IV.'s recognition of the right to parliamentary freedom of speech. Henry IV. said "It was his wish that the Commons treat of all matters amongst themselves in order to bring them to the best conclusion . . . and that he would hear no person before such matters were brought before him by the consent of the Commons" (*id.*, p. 269).

In Henry VI.'s reign one Yonge was imprisoned for moving that the Duke of York be declared heir-apparent. Yonge was afterwards released and his conduct condoned (*id.*, p. 269).

In Henry VIII.'s reign one Strode was imprisoned at the instance of the Stannaries Courts for introducing bills to regulate those courts. After the expiration of three weeks he was released by writ of privilege, and Strode's Act was passed, which provided "that all suits, accusations, executions, . . . punishments, &c., against all persons of that particular or any other Parliament . . . for any Bill, or speaking . . . of any matter concerning the Parliament be of none effect" (Langmead, p. 269).

In Elizabeth's reign members were punished by the Crown for words used in Parliament, and members were warned in Parliament not to be free with their language.

In 1629, Elliot, Hollis and Valentine were imprisoned for injudicious language in Parliament. The court held that Strode's Act was not a public Act, and the Commons resolved that it was. These proceedings were reversed in Charles II.'s reign on the ground that words spoken in Parliament could only be judged of in Parliament. No legal proceedings were ever taken, after this case, in the ordinary courts against anyone in respect of utterances in Parliament (Anson, vol. 1, p. 159; May, 11th ed., p. 99; Feilden, p. 108).

Yet, in the reign of George III., General Conway lost his command for statements and conduct in Parliament, and similar oppressions are attributed to Walpole (Feilden, p. 109; Anson, vol. 1, p. 150; 3rd ed. of Macaulay's Essay on Lord Chatham).

Finally, what is said within the walls of Parliament cannot form the subject-matter of an action for defamation, but where a member gets inserted in a newspaper the contents of a defamatory Parliamentary speech, he can be proceeded against for libel (*R. v. Creevy*, 1 M. & S. 273; distinguished *Wason v. Walter* (1868), L. R. 4 Q. B. 75).

Punishment by the House itself for parliamentary misbehaviour.—The House of Commons punishes improper conduct of all kinds in Parliament. "No member may allude to any

debate of the same session, or any debate in the other House, neither may he use the King's name in an irreverent manner nor for the purpose of influencing the House, nor may he refer to any other member by name." "He must not speak insultingly of either House, or any member of either House." It is the Speaker's duty to preserve order, and his ruling must be obeyed by members. He, or (in committee) the Chairman of Ways and Means, or the Deputy-Chairman, can stop speeches either on the ground of improper language or irrelevance (May, 11th ed., ch. 12).

Closure.—This is a device for extinguishing a debate or speech at once. A member moves that the question be now put, and if the Speaker or Chairman accepts the motion, and it is carried, not less than 100 members voting in its support, further debate on the subject must cease.

The Speaker has a duty cast on him of stopping the motion for closure where he considers that the rights of the minority have been infringed, or the motion operates as an abuse of the rules of the House (Ilbert, *Manual of Procedure*, pp. 113, 271).

The guillotine.—This is a device for curtailing the length of a debate, definite periods being set apart for the successive stages of a bill, and for speeches thereon.

"The Kangaroo."—During the debate on a bill in a committee of the whole House the chairman may choose the amendments for discussion. The same power is vested in the Speaker or other occupant of the chair at the report stage.

Suspension.—Where a member disobeys the Speaker or the chairman or deputy-chairman in committee, is guilty of obstruction, or behaves objectionally, the Speaker or chairman may be asked to name him. The question of suspension is then put, and if carried he can be expelled for as long as the rest of the session (a).

(a) For further information on this subject and procedure generally, see Ilbert, *Manual of Procedure*.

Right to exclude strangers.—This may be regarded either as a corollary to the principle of freedom of speech, or as necessary for the orderly conduct of business, where there is a danger of disorderly interruption.

Formerly any commoner could object to strangers being present. Now he must direct the Speaker's attention to the fact, and the question of turning out such strangers is determined by vote. The Speaker also has the power of ordering strangers to withdraw (Ilbert, p. 219).

Right to restrain publication of debates.—This is another corollary of the privilege of freedom of speech. Mr. Langmead says that members formerly desired secrecy of debate to protect themselves from the Crown, and that they subsequently desired it to protect themselves from their constituents. Mr. Langmead quotes Pulteney, who in 1738 said that "to print or publish the speeches of gentlemen in this House looks like making them accountable without doors for what they said within" (Langmead, p. 582).

In 1771 matters reached a crisis owing to action taken by Colonel Onslow. Certain printers of debates were summoned to the bar of the Commons, and one of them named Miller, who refused to attend, was arrested in the City. Miller gave the messenger of the House into custody for assault. The case was heard by the Lord Mayor, Alderman John Wilkes and Alderman Oliver, who released Miller and committed the arresting messenger. The Lord Mayor and the two aldermen were committed by the House to the Tower, but such convulsions ensued that publication of debates has not been since interfered with (*id.*, pp. 584, 585).

For some time after this reporters were beset with difficulties. They could not get seats, or take notes, and the presence of strangers was often objected to (*id.*, p. 585). The year 1834 was marked by the provision of reporters' galleries, but publication of division lists was not permitted till 1836 (*id.*, p. 585).

The year 1835 witnessed the publication and sale of parliamentary reports and papers at a cheap rate.

In *Wason v. Walter* (1868), L. R. 4 Q. B. 73; Thomas, 157,

it was held that true and faithful reports of parliamentary debates could not form the groundwork of an action for libel. Cockburn, C.J., after remarking that reports of Parliamentary proceedings were on the same legal footing as judicial proceedings, observed that it was of paramount public and national importance that Parliamentary proceedings should be communicated to the public, which has the deepest interest in knowing what passes in Parliament. But a garbled or partial report, or a report of detached parts of proceedings, published with intent to injure individuals will, as in the case of reports of judicial proceedings, be disentitled to protection.

Comments are privileged if made upon a matter of public interest with an honest belief in their justice and with such reasonable moderation as in the opinion of the jury amount to fair and legitimate criticism of the conduct and motives of the person censured.

Section 3 of the Parliamentary Papers Act, 1840, provides that it shall be lawful in any civil or criminal proceeding to be commenced or prosecuted for printing any abstract of or extract from any report of Parliamentary proceedings or papers published by or under the authority of Parliament . . . for the person proceeded against to show that such extract or abstract was published *bona fide* and without malice, and that if such be the opinion of the jury a verdict of not guilty shall be entered for the defendant.

In the case of *Mangena v. Lloyd* (1908), L. T. 824, it was held that the publication of an abstract of or extract from a Parliamentary paper, to wit, a blue book presented to both Houses by His Majesty to lie on the tables of such Houses, is protected by section 3 of the Parliamentary Papers Act, 1840, from proceedings for libel where it is published *bona fide* and without malice (*Mangena v. Lloyd* (1908), L. T. 640), but in the same case it was held on appeal that the protection accorded to the extract or abstract does not extend to the headline where it is not a part of the report (see Thomas, p. 42). In *Mangena v. Wright*, [1909] 2 K. B. 958, it was held that a person who publishes an extract from or abstract of a Parliamentary paper, though in doing so he does not act by or under the authority of

either House, is protected from an action for libel owing to section 3 of the Parliamentary Papers Act, 1840.

Where, again, an allegation is made against anyone in a privileged document like a Parliamentary paper, any person may comment in a fair manner thereon provided he is not the person who has made the allegation in question, and he is immune from proceedings even though the allegation be untrue.

A communication by a public servant to a newspaper on a matter within his own province concerning the conduct of a person who is figuring before the public, the matter being one of public interest, is privileged as regards proceedings for libel.

Freedom from arrest.—Mr. Langmead says that by a law of the Saxon Ethelbert it was provided that if the King call his people to him, and if anyone do them evil, let him pay a bot (compensation) and 50s. to the King.

The privilege commenced forty days before Parliament sat, and lasted during session and forty days thereafter (*b*). It formerly extended to the goods of members and their servants.

In Edward I.'s reign the Master of the Temple petitioned the King to distrain on the goods of his tenant, the Bishop of St. David's. The King refused the request on the ground of the above privilege *re* the goods of members of his council (May, 11th ed., p. 104).

In the case of the Prior of Malton, who was arrested *en route* to Parliament, the privilege was again acknowledged (Langmead, p. 259; May, 11th ed., p. 105).

In the reign of Henry VI. an Act declaratory of the common law was passed, which awarded double damages in the event of the assault of persons *en route* to Parliament (Langmead, p. 259).

In the same reign Speaker Thorpe, a Lancastrian and a judge, was arrested for seizure, in a judicial capacity, of certain

(*b*) In *Goudy v. Duncombe* (1847), 1 Exch. 430; Thomas, 39, it was decided: (1) that the privilege of freedom from arrest lasted during a session of Parliament and forty days before and after; (2) that the immunity from arrest applies equally to dissolutions of Parliament and prorogations; and (3) that in the event of a dissolution a man who was a member of the old Parliament and not of the new could claim the privilege of freedom from arrest.

property of the Duke of York. The Commons demanded Thorpe's release and the point was referred to the judges, who, though favourable to a release, did not act on their opinion, with the result that Thorpe was detained in prison (Langmead, p. 260; May, 11th ed., p. 106).

Mr. Langmead says that prior to 1541 members were released by special statute or writ of privilege, but that in 1541, in the case of Ferrers, the Commons demanded release on their own account, and committed the sheriff for contempt (Langmead, p. 262). They continued after this the practice of demanding release of their members (cf. May, 11th ed., p. 105).

In 1575 Smalley, a member's servant, was arrested for debt, and afterwards freed by order of the House of Commons. As the arrest was a collusive one, in order to get rid of a debt, Smalley was sent to gaol for a month and ordered to pay the creditor £100 (Langmead, 5th ed., p. 275; May, ch. 5).

In 1603 Shirley was imprisoned for debt in the Fleet. His release, demanded by the Commons, was refused by the warden on the ground that he would be liable to an action for escape at the instance of the execution creditor. The King procured Shirley's release, but 1 James I. c. 13, was passed, providing: (1) that a prison governor releasing a member of Parliament was to be free from liability to an action, and (2) that the creditor after the expiration of the privilege be at liberty to re-arrest (Langmead, p. 263).

The statute also recognised the right of the House to set at liberty members of Parliament when arrested, the privilege of freedom of speech, and the right to punish persons procuring the arrest of members of Parliament during time of privilege (Langmead, p. 263; May, 11th ed., p. 107).

The privileges as to the persons of members and servants and the goods of members were put an end to by the combined effect of 12 & 13 Will. III. c. 3, 2 & 3 Anne, c. 18, 11 Geo. II. c. 24, and 10 Geo. III. c. 50, and only the actual persons of members were exempted from civil arrest (Langmead, p. 263; May, 11th ed., p. 108).

The privilege of freedom from arrest has never extended to cases of treason, felony, and breach of the peace, neither does

it now extend to cases of contempt of court. 'In 1839 Mr. Long Wellesley was imprisoned by the Chancery Court for taking one of its wards without the jurisdiction.

A Mr. Charlton was also arrested for contempt, and in 1873 Mr. Whalley and Mr. Guildford Onslow were arrested in a similar way, in connection with the great *Tichborne Case* (Langmead, p. 264).

When a member of Parliament commits a crime he is arrested just like anyone else, and if convicted the judge notifies the Speaker. The papers are then laid before the House at their request, and the question of expulsion is considered.

Mr. Alcock, who became insane during his membership, brought about an Act which provided that persons who have received a lunatic member into an asylum must notify the Speaker at once. A report as to mental condition is then asked for, and a further report at the end of six months. If by that time there is no immediate prospect of recovery the seat may be declared vacant (see the Lunacy (Vacation of Seats) Act, 1886 (c. 16), and Anson, vol. 1, p. 77).

Right of House to regulate its own constitution.—This privilege, as before stated, embraces the minor privilege as to control of elections.

Since *Goodwin's Case*, in the reign of James I., the Crown has never directly interfered with parliamentary elections. Indirect interference was practised till 1832, at any rate. Corruption was, moreover, pretty general till the Ballot Act, 1872. The Corrupt and Illegal Practices Acts contributed greatly to its suppression. By the Parliamentary Elections Act, 1868 (as subsequently amended), the trial of cases of disputed elections was handed over to the judges, and two judges from the rota of election judges now decide these cases. The statute leaves nominally intact the ancient privilege of the Commons, who, as a matter of fact, give effect to the decisions of the Bench. It enables defeated candidates and persons entitled to vote to present a petition to the King's Bench Division for the election to be declared void, and lays down rules of procedure. As regards England and Ireland, the petition must be presented within twenty-one days after the proper returning officer has made his

return to the writ, and £1,000 must be paid into court or secured to meet respondents' costs should they succeed. The election may be declared void where corrupt and illegal practices have been traced to the candidate or his agents, and also in cases where corruption has been sufficiently prevalent to constitute the election unfair. The judges have power to waive irregularities where there has been no actual miscarriage of justice, and have, moreover, ample discretion as to costs.

In Scotland election petitions are tried before a judge of the Court of Session, and certain modifications of procedure are made by section 58 of the Act of 1868.

The following cases decide important points as to parliamentary elections :—

Ashby v. White.—One Ashby, a voter of Aylesbury, was refused a vote by the returning officer. On proceedings being taken judgment was recovered on the principle of *ubi jus ibi remedium*. No damage was sustained, as the candidate for whom Ashby would have voted was elected.

Mr. Langmead tells us that on motion in arrest of judgment it was held (Holt, C.J., dissentiente) that no action lay, but the Lords on appeal decided otherwise. This resulted in the Commons passing a resolution that this constituted an infringement of their privilege (*Ashby v. White* (2 Anne), 1 Sm. L. C. 240; Thomas, 29).

Case of the Aylesbury Men.—After this case, five Aylesbury voters brought actions on similar lines to Ashby's, and for their pains were sent by the Commons to prison for contempt. Writs of *habeas corpus* were unsuccessfully applied for. On appeal to the Lords upon writ of error the men nearly gained their liberty, but Queen Anne, on being petitioned about the privilege by the Commons, got rid of all difficulties by proroguing Parliament, thus setting the captives at liberty. This right of the Commons to decide contested elections was, according to Mr. Langmead, prostituted to party purposes, the abuse culminating during the reigns of George II. and George III. Grenville tried to put matters on a right basis by an Act whereby a sworn committee of thirteen persons selected by the House and petitioner was appointed to decide these cases, but the House, which

resented the imputation of bias cast upon it at times, finally agreed to the passing of the Parliamentary Elections Act, 1868 (*Case of the Aylesbury Men*, 4 O'M. & H. 59).

Barnardiston v. Soame, 6 St. Tr. 1063).—In this case a returning officer was sued for making a double return for one vacancy. Plaintiff won, but the verdict was upset, and afterwards the making of a double return was, in theory, deemed illegal; a custom arose of the Commons allowing them in difficult cases.

By 7 & 8 Will. III, c. 7, s. 3, returning officers *falsely* making double returns are exposed to the penalties specified therein.

This Act disposes of all contentions as to double returns being illegal, and it is now fully recognised that a returning officer, when the voting is equal, has a casting vote, but that he need not exercise the option, but may return two or more members for one vacancy instead. Though the House has practically transferred to the law courts judicial cognisance of disputed election cases, it may still, if it chooses, question the legality of any given election.

The House can also expel and refuse to admit persons whom they deem unworthy to be members of their assembly, whether interested parties have moved in the matter or not.

Rossa was expelled in 1870, O'Donovan and Mitchell in 1875, and Davitt in 1882. In the matter of expulsion, a new Parliament is not affected by the conduct of a former one (Anson, vol. 1, p. 167; May, 11th ed., p. 657). When the House expels, it cannot prevent the re-election of the man who has been expelled.

Right to decide matters arising within the walls of the House.—The great case as to this is *Bradlaugh v. Gossett*, 12 Q. B. D. 271; Thomas, 45. The Serjeant-at-Arms, acting under orders, prevented the entrance of Bradlaugh to the House. Bradlaugh thereupon sued for a declaration that the order of the House for his exclusion should be pronounced invalid. The court decided against the plaintiff on the ground that the decision of the Commons on matters arising within the precincts of the House could not be controlled by the courts of justice. Stephen, J., however, was of opinion that the line must be drawn somewhere,

and that the Commons could not try, say, a murder which took place under its roof.

Right to punish members and outsiders for contempt.—In the case of *Gossett v. Howard*, where a person was arrested by the Serjeant-at-Arms for refusing to appear as a witness before the House, judgment to the following purport was pronounced by Baron Parke :—"The House, which forms the Grand Inquest of the nation, can compel attendance of witnesses, and in case of disobedience bring them in custody to them for examination; and secondly, if there be a charge of contempt and breach of privilege, and an order for the person charged to attend and answer, and then a wilful disobedience of that order, the House may cause offender to be brought in custody to answer the charge, and the House is the proper judge as to when these powers should be exercised" (*Gossett v. Howard*, 10 Q. B. 451).

In the *Case of the Sheriff of Middlesex*, 10 Ad. & E. 273; Thomas, 44, it was held that a parliamentary warrant of detention was not bad because of its omission to state the grounds of that detention.

Burdett v. Abbot (1811), 4 Taunt. 401; Thomas, 34, was an action of trespass against an officer of the Commons for breaking into the plaintiff's house and carrying him to the Tower. The court held (1) that the power of either House to commit for contempt is reasonable and necessary and well established by precedents; (2) that the execution of a process for contempt justified the breaking into the plaintiff's house.

Shaftesbury's Case (1677), 1 Mod. Rep. 144, shows the power of the Lords to commit for contempt, and *Burdett v. Abbot* shows that the Commons have a similar power. But there is this difference, that the Commons can only commit till the close of the session, whereas the Lords can commit for a definite period.

In the case of *Burdett v. Abbot* Lord Ellenborough said : "If a commitment appeared to be for contempt of the House of Commons generally, I would neither in the case of that court nor of any other of the superior courts enquire further; but if it did not profess to commit for contempt, *but for some matter appearing on the return* which could by no reasonable intend-

ment be considered as a contempt of the court committing, but a ground of commitment palpably arbitrary, unjust, and contrary to every principle of natural justice, I say that in case of such a commitment we must look at it and act upon it as justice may require from whatever court it may profess to have proceeded" (*Burdett v. Abbot*, 14 East. 150).

Modes of punishment adopted by the Commons.—The modes of punishment are four, viz., admonition, reprimand, fine and imprisonment.

When an admonition is contemplated, the offender is asked to attend at the bar of the House, and lectured by the Speaker. In cases of reprimand he is brought by force to the bar and then reprimanded (cf. May, 11th ed., p. 93).

Fines are now obsolete, though an offender may be detained till he has paid House fees (cf. May, 11th ed., p. 93).

When a man is committed by order of the House, he is at times, but not necessarily, given an opportunity of apologising. He may, however, be committed straight away, whichever course is pursued. He is set free at the end of the session, and if not set free could demand a *habeas corpus* (see Anson, 3rd ed., vol. 1; May, p. 94).

Conflict between Parliament and law courts.—Of these conflicts the cases of *Ashby v. White* and the *Aylesbury Men* are memorable instances; but the leading decision on the subject is that of *Stockdale v. Hansard* (1839), 9 A. & E. 1; Thomas, 40. The House of Commons instructed Messrs. Hansard, the parliamentary printers, to publish copies of reports of certain inspectors of prisons. These reports were distributed to members and sold to the public. Stockdale, considering himself libelled by these reports, sued Messrs. Hansard and won, the court holding that it is no defence to a libel action that the defamatory matter was part of a document which was by order of the House laid before it, and thereupon became part of its proceedings, and which was afterwards by like order printed and published by defendant.

"This denial of parliamentary privilege," says Mr. Langmead, "was met by a resolution of the Commons that the power of publishing their proceedings and reports was an essential

incident of the constitutional functions of Parliament, and that any person instituting a suit as to, or any court deciding on a matter of privilege contrary to the determination of either House would be guilty of a breach of privilege." Stockdale brought other actions, and won.

The sheriff levied execution, and he (the sheriff), Stockdale and his solicitor were committed for breach of privilege. Finally, the deadlock was removed by the passing of an Act which provided, in effect, that all actions like that of *Stockdale v. Hansard* should be stayed on production of a certificate or affidavit that the paper complained of has been published by order of either House (Langmead, pp. 586, 587, and see the Parliamentary Papers Act, 1840 (c. 9)).

The above case also caused a dispute between the two Houses as to the Upper House exercising its appellate jurisdiction to deprive the Lower House of its privileges, and the controversy was so acute that Parliament had to be prorogued.

With reference to this point Sir Erskine May says: "Assertions of privilege are made in Parliament and denied in the Courts. The officers who execute the orders of Parliament are liable to vexatious actions; and if verdicts are obtained against them the damages and costs are paid by the Treasury. The parties who bring these actions, instead of being prevented from proceeding with them by some legal process acknowledged by the Courts, can only be coerced by an unpopular exercise of privilege, which does not stay the action, and a statutory enactment is the only remedy. It is not desired that Parliament should, on the one hand, surrender any privilege essential to its dignity . . . nor, on the other, that its privileges should be enlarged. But some mode of enforcing them should be authorised by law analogous to an injunction. . . . to restrain parties proceeding with an action at common law, and that such prohibition should be binding not only upon the parties but upon the Courts."

CHAPTER XXXIV.

HISTORY OF LEGISLATION—PUBLIC BILL LEGISLATION—
PRIVATE BILL LEGISLATION.

History of Legislation.—We can trace three distinct epochs :
 (1) That of Royal legislation by the King and his council.
 (2) That of legislation by petition, the period when the estates of the realm, and afterwards the two Houses, petitioned the King for a given law, and the King either complied with their wishes or not as he pleased, and in what way he pleased. (3) The epoch of legislation by bill, when both chambers of the Legislature drafted the measure petitioned for (called, as at the present day, a bill), and the King assented to it, as he does now. Legislation by bill dates from the time of Henry VI., though the way had been prepared for it in the preceding reign (a).

Royal Legislation.—The laws made by the King went by various names. There were (1) charters or quasi-treaties made between King and people; (2) constitutions, probably so called after the imperial constitutions of the Roman Empire; (3) Assizes (b); (4) Ordinances—laws made by the King in Council.

(a) The word "bill" meant a petition—*e.g.*, a Bill of Complaint, the well-known old Chancery pleading.

(b) The word "assize" denoted, in the first place, a sitting of the King and his Great Council—*e.g.*, Assize of Northampton; afterwards it came to mean a law made at the meeting—*e.g.*, Assize of Clarendon; and, lastly, it assumed its present meaning, which is that of an institution created by a King's law—*e.g.*, the Maidstone Assizes (cf. Maitland, *Const. Hist.*, p. 13). The word was also used to denominate the mediæval equivalents for juries—*e.g.*, the Grand Assize, the Petty Assize. We have several instances of assizes in the reign of Henry II.—(1) The Grand Assize, consisting of twelve knights chosen by four knights in the presence of the King's justices, which tried questions of ownership of land and rights issuing out of land under a writ of right; (2) The following possessory assizes, which protected possession as opposed to ownership, and which were granted without prejudice to a writ of right. Here the object was to prevent the use of force, whether the individual

It is difficult to fix a precise date for the commencement of legislation by petition, but it is significant that in the reign of Edward I. the statute *Quia Emptores* was passed *instantia magnatum*. So, again, in the reign of Edward III. the Statute of Treasons was passed at the instance of the Commons, who wanted a declaration by Parliament as to what was treason and what was not.

Legislation by petition had the following drawbacks : (a) the King might alter the wording of the law required by the petitioners ; (b) he might grant an ordinance which, being a law made by the King and his Council, could be annulled, say, the next day by the same body which made it. The ordinance was not like a statute, publicly enrolled and only revocable by statute.

In the reign of Henry V. the Commons petitioned the King that they, being assentors as well as petitioners, request that from that time no law be made and engrossed as a statute which differed in wording from the corresponding petition, whether by additions, deletions or otherwise. The King assented to this petition, saving his royal prerogative to grant or deny what he chose. The King still legislates by ordinance or its equivalent for conquered and ceded colonies. Ordinances as regarded the United Kingdom were later on styled Orders in Council.

Legislation by Bill is the form of legislation now existing. Its introduction in the reign of Henry VI. had important consequences. Rules of debate and also of procedure sprang up and a necessity arose for committees to consider bills. Legislation

who employed such force had a good claim to the ownership of the property or not. The possessory assizes were as follows : (a) *Novel Disseisin*—e.g., if A recently have in possession of the land in dispute, let him not be forcibly dispossessed but remain in possession without prejudice to a writ of right ; (b) *Mort d'Ancestor*, or assize "de morte antecessoria." If A's ancestor died possessed of the land, let him not be dispossessed by force, but let the ejector have his writ of right (if any) ; (c) *Darrein Presentment*. If A presented a clerk to the living in dispute on the last vacancy, let him present on the present occasion without being forcibly molested, but without prejudice to a writ of right ; (d) *Utrum*, to decide the question whether a given piece of land was lay or church land. In all these cases the question of possession was decided not by twelve knights, as in the case of the Grand Assize, but by twelve lawful men summoned by the sheriff.

by bill has the following advantages : Numerous experts, in the case of a Government bill, at any rate, will have been consulted before its introduction. The bill is published and sold, the Press can comment on its provisions, and thus the opinion of the governed can be sounded beforehand. There have been rare instances lately of legislation by resolution of both Houses, such resolutions, of course, resting ultimately on statutory powers. In the case of the Church of England Assembly (Powers) Act, 1919, the Church measure, after being examined first by the legislative committee and afterwards by the ecclesiastical committee, becomes law if both Houses pass it by resolutions on the subsequent receipt of the royal assent.

In the Emergency Powers Act, 1920, the King is enabled by proclamation to issue regulations, disobedience to which is temporarily a criminal offence ; and provision is further made by the Act for prolonging the operation of these regulations beyond a period of seven days from their being laid before Parliament if both Houses pass resolutions in favour of such prolongation. It would be premature at the present time to assert that legislation by resolution is subtly encroaching on legislation by bill. In the case of ecclesiastical legislation it is decidedly arguable that the Church Assembly's legislation is its own affair, just like the legislation of a county council, and that in the case of the Emergency Powers Act prompt legislation of a very drastic kind was imperatively necessary. Sudden disorders call for prompt and fearless treatment.

Various kinds of bills.—A project of law during its passage through Parliament is called a bill, and its sub-divisions are called clauses. Every bill must have a short title. There are four classes of bills :—

1. Public bills, *i.e.*, measures affecting the community at large or altering the general law.

2. Private bills, *i.e.*, measures dealing with local or personal matters, such as railway bills, and bills giving special powers to municipal corporations, or altering settlements.

3. Hybrid bills, *i.e.*, bills brought in as public bills, but which affect private interests in such a way that if they were private bills preliminary notices to persons affected would have to be

given under the Standing Orders, *e.g.*, the Port of London Bill, 1903. As to the special procedure adopted in the case of hybrid bills, see Ilbert, *Manual of Procedure*, pp. 144-145; May, 11th ed., p. 468.

4. Provisional order bills, *i.e.*, bills confirming orders and schemes made by public departments under statutory powers which otherwise would have to be dealt with by private bills. The delay and expense of private bill legislation is thus saved. The bill merely confirms the schemes or orders which are scheduled to it, and is introduced as a public bill by the Minister in charge of the department concerned. As to the subsequent special procedure, see Ilbert, *Manual of Procedure*, p. 235, and May, 11th ed., ch. 30.

Public Bills.—Most public bills may originate either in the Commons or the Lords, but there are certain classes of bills, such as money bills and bills dealing with the representation of the people, which can only be brought in in the Commons. The normal course of a bill in the Commons is as follows :—When a member wishes to introduce a bill, he must either move for leave to bring it in or, according to a new practice, present it at the table. Notice must be given before either course is adopted. The bill is ordinarily laid on the table in “dummy,” *i.e.*, a sheet of paper on which is the name of the member and the title of the bill. The first reading of the bill is usually a matter of form. The title only is referred to, but sometimes if the bill is likely to be opposed a short explanatory statement is allowed. When the bill has been read a first time it is ordered to be printed, and the print is then circulated to members and put on sale. The next stage is second reading, which is the stage for discussing the main principles of the bill. The member in charge can put it down for any day he likes, and if it is not reached on that day then on any subsequent day. If no one objects to the bill, it can be read a second time when unopposed business is taken, but if it is opposed it can only come on on one of the days fixed for taking opposed bills. The Government, of course, can arrange their own order of business, but the days for private members’ bills are limited, so precedence on those days is balloted for. When a second reading is opposed, the opponent

does not move the rejection of the bill, but he moves "that be read a second time on that day six months," and if ^{1^e} motion is carried the bill is disposed of for that session. When a bill (other than a money bill) has been read a second time goes to one of the six standing committees, unless the House otherwise orders. In that case it may be referred to a committee of the whole House or to a select committee, or occasionally to a joint committee of the two Houses. The committee stage is the stage for amending a bill. The bill is taken clause by clause, and amendments are moved in the order in which they come in the clause. When the clauses are finished new clauses and postponed clauses are then considered. After that the schedules, if any, are taken. The bill is then reported to the House. When a bill has been considered by a select committee, it must afterwards go through committee of the whole House. When the House goes into committee, the Speaker leaves the chair and his place is taken by the Chairman of Ways and Means Committee. If a bill has passed through committee of the whole House without amendment, it may at once be put down for third reading, and then, when read a third time, sent up to the Lords. But in other cases it must be put down for consideration on report. On the report stage the bill may, with certain restrictions, be amended as in committee, only new clauses come first, and the clauses as they left committee are taken afterwards. After the bill has been considered on report, it is put down for third reading. At this stage only verbal amendments can be moved, but the bill as a whole can be opposed. When a bill has been read a third time, the Commons have done with it, and it is sent up to the Lords, and put under the charge of some peer to conduct it through that House. The procedure in the Lords resembles generally the procedure in the Commons, but there are certain points of difference, and there is greater elasticity as to forms. Bills, after going through committee of the whole House, usually go also to a standing committee, and amendments may be moved on third reading and also on the motion that the bill do pass. If a bill coming from the Commons passes through the Lords without amendment, it only awaits the royal assent. But if it is amended, the amendments

come back to the Commons for consideration. The Commons may assent to them, or dissent from them, or further amend them, and when they dissent a committee is appointed to draw up reasons. If eventually the two Houses cannot come to an agreement, the bill is lost. But if the two Houses agree, the bill receives the royal assent in the House of Lords. This is usually done by commission, though it might be given by the King in person.

For fuller details see Ilbert, *Legislative Methods*, ch. 6, and *Manual of Procedure*.

Money bills and clauses.—The right of initiating taxation or allocating the expenditure of the revenues of the State is the province of the House of Commons. As Sir Erskine May says, "The Crown demands money, the Commons grant it, and the Lords assent to the grant." Money bills, that is to say, bills of which the main object is to raise money by taxation, can only be introduced in the House of Commons, and their introduction must be authorised by resolution in committee of the whole House, moved by a Minister of the Crown. Bills for other purposes, but which contain financial clauses, may be brought in in the ordinary way, but their financial provisions must be authorised by a similar resolution. Bills containing clauses imposing rates or dealing with rates must likewise be initiated in the House of Commons, but no special procedure is then required. The House of Lords cannot amend a money bill or any clause in a bill dealing with taxation, and strictly speaking cannot touch a rating clause, but the House of Commons waives its privileges in respect of pecuniary penalties, fees for services rendered, and rating clauses in private bills. Where a bill is introduced into the House of Lords, and it would be incomplete without some financial provision, the necessary clause is printed in italics. It is no part of the bill itself, and is a mere indication by the Lords to the Commons of what they suggest would be an appropriate financial provision (see *Manual of Procedure*, *tit.* "Money Bills").

Bills dealing with the royal prerogative or Duchy of Cornwall.—When the consent of the Crown or the Duke of Cornwall is

required to a bill dealing with the proprietary rights of either, such consent is announced to the Commons by a privy councillor (see May's Parliamentary Practice, pp. 170, 171, 451—456).

Standing Committees for public bills.—To economise the time of the House, two standing committees were appointed in 1883 as a substitute for committee of the whole House in the case of public bills. Subsequently two more were added, and at the beginning of 1919 there were four altogether—the A, B, and C Committees, and the Scotch Committee.

Early in 1919 two important reforms were introduced. First, two fresh standing committees were added, bringing the total to six. Secondly, whereas previously bills were referred after second reading to a committee of the whole House, unless the House otherwise ordered, bills are now referred to standing committees, unless the House orders them to be referred to committee of the whole House. Money bills, however, *e.g.*, any bill whereby a tax is imposed, Consolidated Fund bills, or appropriation bills, continue to be referred without exception to a committee of the whole House; and there seems to be a movement in favour of according the same treatment to any first-class controversial measure.

Nature and Constitution of the Standing Committees.—Each standing committee should be a microcosm of the whole House, so that a majority of votes in the committee, when a party bill is involved, should reflect the views of the predominating party. With the exception of the Scotch Committee, each standing committee consists of not less than forty nor more than sixty members, who are nominated by the Committee of Selection.

A bill may be considered as to part thereof by a standing committee, and as to another part thereof by a committee of the whole House.

When a bill relates to Monmouthshire or Wales, all the members for Monmouthshire and Wales must be on the committee (Manual of Procedure, pp. 74, 298).

The Scotch Committee consists of all the Scotch members plus not less than ten nor more than fifteen other members.

Private bills.—Private bills are usually concerned with schemes of public utility which affect private interests. For example, a new railway may compete unfairly with an existing line, and the addition of a new district to a municipal borough may prejudicially affect the county rates, and a water supply scheme, besides requiring land to be taken compulsorily, may prejudicially affect the neighbourhood from which the water is taken. The procedure on private bills therefore assumes a quasi-judicial character. Parliament requires that full notice should be given, so that the parties affected may come in and oppose, and when the bill is referred to a committee, counsel and witnesses are heard on behalf of the contending parties (cf. May, 11th ed., p. 687).

Outline of procedure.—In the months of October and November the proposals of the bill must be publicly advertised in certain newspapers (see Standing Orders for Private Business, 3 to 10).

On or before November 30 in the year preceding the proposed passing of the Act, plans of the proposed scheme, sections and books of reference, according with directions specified in the Standing Orders, must be left with certain local authorities in the Private Bill Office (S. O. 23—31, and 39—55). On or before December 15, owners and occupiers of land affected by the scheme must be served individually with notice thereof by post.

A deposit of money by the promoters has generally to be made on or before January 15 as a security of good faith, and is forfeited in certain events (S. O. 57—59).

On or before December 17 the petition for the bill, a copy of the bill itself, and a formal declaration made by the agent must be deposited in the Private Bill Office.

On January 18 the examiners appointed by Parliament begin their sittings for the purpose of ascertaining whether the Standing Orders of Parliament have been complied with, and compliance is certified by indorsing the bill to that effect. These examiners are two in number, one being appointed by the House of Lords and the other by the Speaker. When the examiners report that Standing Orders have not been complied with, this

report goes to the Select Committee on Standing Orders, who have power to dispense with non-compliance.

On or before January 28 the Chairman of Ways and Means in the Commons, and the Chairman of Committees in the Lords, fix personally, or through their counsel, in which particular House any given bill is to be considered first (Ilbert, *Manual of Procedure*, p. 221).

The procedure on private bills when they reach either House of Parliament is exceedingly complicated, because of their semi-litigious and semi-legislative character. Assuming that the Standing Orders have been complied with, or that, pursuant to the report of the examiners, compliance with the Standing Orders may be dispensed with, a private bill is usually introduced by being presented at the table, and when it has been laid on the table it is deemed to have been read a first time, and is ordered to be read a second time at a future date. Intricate questions frequently arise as to the *locus standi* of various parties to appear and be heard before a Private Bill Committee. These questions are determined in the House of Commons by the Court of Referees, and in the House of Lords by the Chairman of Committees. There are special provisions about railway bills, but ordinarily when a private bill has passed second reading it goes to the Committee of Selection, who send it to one of the small committees on private bills. The Private Bill Committee then proceeds to hear counsel and witnesses for and against the objects of the bill, and if they find that a sufficient case for legislation has been made out, declare the preamble proved. The clauses are then gone through before the contending parties, evidence is taken and arguments of counsel heard, and amendments, if necessary, are made. When a bill has been amended in one House, it is hardly ever amended in the other House, unless by consent, but the principle is again gone into, and not infrequently a bill passed by one House is rejected by the other. It must be borne in mind, as Sir Erskine May points out, that though "private bills are subject to notices, forms and intervals unusual in other bills, yet in every separate stage when they come before either House they are treated as if they were public bills. They are read as many times, and similar questions are

put except when 'any proceeding is specially directed by the Standing Orders' (May, 11th ed., p. 689).

It is to be noted that the foregoing sketch does not relate to Scottish bills. A special procedure has been provided for Scotland under the Private Legislation Procedure (Scotland) Act, 1899.

Decline in private bill legislation.—Sir C. Ilbert (c) calls attention to a decline in the volume of private bill legislation, which he ascribes (1) to the expense involved; (2) to the absorption by general Acts, *e.g.*, the Public Health Act, 1885, of much of the sphere formerly occupied by private Acts; and (3) to the machinery of provisional orders, whereby an order made by a public department after holding a local enquiry may achieve the same results as a private Act with less expense.

(c) Parliament, 1920 ed., pp. 87-88.

CHAPTER XXXV.

TAXATION AND FINANCE.

King's extraordinary revenues.—The Norman King had his ordinary and extraordinary revenues, the ordinary consisting of his feudal dues, money raised from Jews, *bona vacantia*, waifs, strays, whales and sturgeons, and other miscellaneous sources of profit, and he had profits made from his courts of justice by the imposition of fines, &c. When money was required for a war and on an emergency, he asked for extraordinary aids. Henry II. taxed personal property for the Crusades, the tax being known as the Saladin Tithe. The great complaint against John was his unfair taxation, and during his reign taxation was direct, *i.e.*, levied directly on the person who had to pay it, and there was also indirect taxation levied on commodities. The barons in John's time complained of both kinds of taxation and Magna Charta contained provisions as to both sorts. Article 12 of Magna Charta provided that the King should demand no aid other than the three accustomed aids. The City of London again was only to render its accustomed aids. Article 13 of the Charta provided that the City of London should retain its ancient liberties and free customs, and other cities, boroughs, and ports should have the like privilege. By Article 41 foreign merchants were not to be liable to evil tolls, but only to the ancient and proper customs duties, except during war.

By *Confirmatio Chartarum* (1297) the charters of John and Henry III. and the Charter of the Forest were to be confirmed. It provided that aids, tasks, and prises be not taken in future without the consent of all the realm saving the ancient aids. It was further provided that the maltote—a toll of 40s. on each sack of wool—and other like tolls be not levied but by consent of the realm, saving the ancient aids and customs due, and customs of wools, wool skins, and leather already granted by the commonalty aforesaid.

In 1297 a statute—supposed to be not genuine—was said to have been passed forbidding tallage (a), and it was known as *De tallagio non concedendo*.

By the Petition of Right (1628) tallages, aids, forced loans and benevolences (b) were forbidden and the Bill of Rights provided that the levying of money to the use of the Crown by pretence of prerogative was to be thenceforth illegal.

In Stuart times import duties were not considered as taxes, but rather in the light of licences or concessions. In 1606 John Bate, a Levantine merchant, refused to pay a duty on currants imposed by James I. The court held that the King's power was both ordinary and absolute : the ordinary or common law power, which exists for the purposes of civil justice, cannot be changed without the leave of Parliament, but the King's absolute power, affecting matters of State, is *salus populi*, and is not directed by rules of common law, but varies according to the royal wisdom (see *ante*, p. 125). Customs are a material matter of State. Judgment in matters of prerogative must not be according to common law but according to Exchequer precedents (c).

In the case of the five knights, also known as *Darnell's Case* (1627) the defendants were imprisoned for refusing to pay a forced loan. They applied for a *habeas corpus*, but Hyde, J., and other judges held that detention by special command of the King was legal. This case was largely instrumental in bringing about the Petition of Right, which forbade forced loans and benevolences.

In 1637 John Hampden, a native of Bucks, refused to pay

(a) Stubbs doubts the authenticity of this supposed enactment.

(b) Forced loans, according to Langmead, were said to have been first imposed in the reign of Edward II., but that they might have been imposed earlier. The first instance of a benevolence was probably in the reign of Edward IV.

(c) Reference was here made to customs duties levied by Edward I., Henry VIII., and Mary. All customs are the effect of foreign commerce, and all commerce and foreign affairs are in the hands of the King. The seaports are the King's gates, which he may open or shut to whom he pleases. He provides for safety. If he may restrain the person by a writ of *ne exeat regno*, he may *à fortiori* restrain the importation of goods, and if he may restrain these absolutely, he may do so *sub modo*. If the King may impose, he may impose what he pleases (Thomas, pp. 26 and 27).

a tax known as "ship money." An action was brought, and on Hampden demurring, the case was argued in the Court of Exchequer Chamber, where Finch delivered judgment to the following effect: "The defence of the kingdom must be at the charge of the whole kingdom. The law which has given the King his interest and sovereignty of defending and governing the kingdom also gives him power to charge his subjects with its defence, and they are bound to obey. The precedents show that though for ordinary defence they go to maritime counties, but yet when the danger is general they go to inland counties also. Acts of Parliament to take away the royal power in the defence of the kingdom are void." This decision rests on the principle *salus populi suprema lex*.

To sum up. The middle of the 14th century witnessed the first precedent of appropriating moneys voted by Parliament to a special purpose, namely, war, and before its close it was practically impossible for the King to impose indirect taxation.

In 1407 it was understood that money bills should originate in the Commons and were not to be reported on to the King till both Houses were agreed, and they were to be reported by the Speaker of the Commons. As to the Parliament Act, 1911, see pp. 287 *et seq.*

Modern Finance.—Sir Erskine May says: "The Crown acting on the advice of its responsible Ministers being the executive power is charged with the management of all the revenues of the country and with all payments for the public service. The Crown, in the first instance, makes known to the Commons the pecuniary necessities of the Government and the Commons grant such aids and supplies as are required to satisfy these demands, and provide by taxes and appropriation of other sources of public income the ways and means to meet the supplies granted to them. The Crown demands money, the Commons grant it, and the Lords assent to the grant."

See pp. 287 *et seq.* for effects of Parliament Act, 1911. The Commons do not vote money unless it be required by the Crown, nor impose or augment taxes unless taxation be necessary for the public service as declared by the Crown through its responsible Ministers.

The revenues of the State are not solely derived from taxation, as there is the King's revenue from Crown lands, which is exchanged for an annual sum known as the Civil List, and there are also other sources of revenue, *e.g.*, Suez Canal profits. Taxes are either permanent or annual, and the greater the amount of annual taxation the greater the control of the Commons over fiscal matters; *e.g.*, the income tax is a tax imposed annually.

The Consolidated Fund.—All revenue of whatever kind goes into the Bank of England, where it is paid to the Government account there, called the Consolidated Fund. Formerly there were two consolidated funds, one for England, Wales and Scotland, and the other for Ireland. Before 1787 the taxes were charged without any method on particular sources of revenue, but the younger Pitt established the Consolidated Fund and charged all taxes upon it.

The two kinds of public expenditure.—There are, as we have seen, two kinds of expenditure, permanent and annual. The following kinds of expenditure are permanent items: (1) The King's civil list; (2) the salaries of the judges of the High Court, the Speaker, the Comptroller and Auditor-General, the perpetual curate of Alderney and divers other persons (Anson, vol. 2).

Consolidated Fund services.—The permanent payments out of the Consolidated Fund which go on from year to year are called Consolidated Fund services.

Supply services.—These services are not permanent charges on the Consolidated Fund, but are voted annually and include payment for Army, Navy, Civil Service and the bulk of the expenses incurred by the Government.

The National Debt.—It frequently happens that after payment of all anticipated calls there is a surplus, and this surplus is never retained, but passes automatically by statute to the reduction of the National Debt. Till the days of the Stuarts there was no national debt. During the Civil War many persons left money with the goldsmiths of the City of London. After the Restoration these goldsmiths began to act as bankers, and they

lent money to Charles II. on the security of the revenue. In 1671 payment was postponed for twelve months, but there was further indefinite delay. In 1677 partial relief was given by the Government by the granting of annuities out of the hereditary excise (*d*). These annuities were, though delayed, paid till 1688, but ceased after that year.

About the time of the Revolution suits were brought by petitions to the Barons of the Exchequer for payment of the arrears, and the matter was then argued in the Exchequer Chamber. On this occasion it was held by a majority of the judges that the King could alienate the revenues of the Crown (*Bankers' Case*, Broom, Constitutional Law, p. 225).

The Crown granted no relief to suppliants until by 12 & 13 Will. III. c. 12, s. 3, the hereditary excise was ordered to be charged with a yearly amount equivalent to interest at £3 per cent. until redeemed by repayment of one-half of the principal sum. Thus arose the £3 per cent. Consolidated Bank Annuities (*e*).

(*d*) When the King gave up his military feudal dues owing to knight-service being converted into free and common socage, he had certain excise profits settled on him by way of compensation. This is one of the very few instances of the Crown being compensated for loss of its prerogative. The Statute of Tenures indirectly sanctioned a man leaving by his will his entire lands of all kinds save entailed land. Personalty could always practically be left by will, though for some time a man was supposed to divide his property into three parts, one part of which he could dispose of as he chose and was usually given to the clergy, the second part went to the wife, and the third part to the children. If there were no children or wife the testator could dispose of the whole. If there were children and no wife the testator could dispose of half, and he could also dispose of half where there was a wife and no children. This rule was gradually abolished. Before the Statute of Uses it was the custom for a man to grant his property to a friend to hold to the uses of his will. The Statute of Uses (27 Hen. VIII. c. 10) stopped this practice by making the user of an estate the legal owner and liable to forfeiture and other burdens, but the Statute of Wills (32 Hen. VIII. c. 1) permitted the tenant by knight-service to will away two-thirds of his land, and the socage tenant the whole of his lands. The Statute of Frauds insisted on three credible witnesses attesting wills of land, but prescribed no attestation for wills of personalty. The Wills Act, 1837 (c. 26) prescribed two witnesses for wills of personalty and realty. This statute further provided that no will of realty or personalty could be made by an infant. Before the Wills Act, males over fourteen and females over twelve could make wills, and until the Wills Act, 1837, no attestation was necessary.

(*e*) These are called the 3 per cents. because 3 per cent. was for a long time

The funded debt.—When a man buys an annuity he does not get back his principal, but if he wishes to realise his interest he sells it in the market. As against the Government, he has only a claim to interest. The Government, however, can redeem a holder of these annuities or funded debt at par.

Unfunded debt.—This consists of loaned moneys repayable at certain fixed dates (Langmead, p. 495).

In 1787 the younger Pitt charged the whole of the National Debt on the Consolidated Fund.

The Sinking Funds.—Any surplus remaining after the annual expenditure goes to redeem the National Debt (Langmead, p. 498). By the Sinking Fund Act, 1878, the Treasury have within fifteen days after the expiration of the financial year (April 1) to prepare a statement of income and expenditure. Any surplus remaining in the Bank of England goes to the National Debt Commissioners and is known as the *Old Sinking Fund*. The Act also imposes on the Consolidated Fund a permanent annual charge for payment of *interest* on the National Debt and directs that *any surplus of this interest* not required for the payment thus directed is to be applied by the National Debt Commissioners in reduction of the principal of the National Debt (Ilbert, Parliament, 1st ed., p. 97). This last is the new Sinking Fund.

The estimates.—Every autumn the Government Departments send estimates of the amounts they propose to spend for departmental purposes to the Treasury, and it is the duty of the Chancellor of the Exchequer, as the friend and protector of the taxpayer, to cut down these departmental estimates to the lowest amount compatible with reason, and should any dispute arise between the departments and the Treasury, it behoves the Cabinet to settle the difference.

The Budget.—Every April the Chancellor is supposed to have his Budget ready and when he introduces it in committee, he or

paid. They were called consolidated annuities because they were charged on the Consolidated Fund. They are called bank annuities because the dividends are paid by the Bank of England and stock is transferred in its books. They are called annuities because one purchases an annual sum in perpetuity.

some Minister on his behalf makes the Budget speech. This Budget speech reviews the past year's taxation, gives an estimate of what will be required for the present financial year, and a suggestion of what additional taxation will be necessary. If there is to be a reduction of taxation this is also mentioned, together with the taxes proposed to be reduced.

Committee of Supply.—This committee of the whole House of Commons considers the estimates and then votes the requisite grants of money (Ilbert, *Parliament*, 1st ed., p. 100). The Committee of Supply can only decrease but cannot increase the grant voted.

Committee of Ways and Means.—After the Committee of Supply has voted the requisite grants the Committee of Ways and Means authorises the imposition of any given tax and passes resolutions that any sums of money voted shall issue out of the Consolidated Fund (Ilbert, *Parliament*, p. 100). The Committee of Ways and Means is also a committee of the whole House of Commons.

Comptroller and Auditor-General.—It is the duty of the Comptroller and Auditor-General to see that no money leaves the Consolidated Fund without statutory authority. He is a high official and is not allowed to sit in Parliament, and he holds office during good behaviour. It is a special duty of his to see that the money, after it has left the Consolidated Fund, is properly applied, and he also prepares accounts of income and expenditure for the Public Accounts Committee of the Commons together with a report of anything requiring notice.

The Public Accounts Committee consists of fifteen members of the Commons, appointed at the commencement of every session.

Ways and Means Acts or Consolidated Fund Acts.—It often happens that money is wanted by the Departments before the Annual Appropriation Act, which settles what amounts they are to have, and which is passed at the end of the session. Tem-

porary statutes are therefore passed and these incorporate the decisions of the Committees of Supply and Ways and Means. The Appropriation Act then deals with the balances, if any, undisposed of.

The Finance Act passed at the end of each session authorises and legalises the decisions as to taxation arrived at in Committee of Ways and Means.

Ilbert says that the House of Commons has the two following important duties as to finance :—

(1) The expenditure of such money as has to be provided by annual taxation must be authorised by the Commons (Ilbert, Parliament, p. 198).

(2) The annual taxation has to be authorised.

The former, he continues, culminates in the annual Appropriation Act and the latter in the annual Finance Act (*ibid.*, p. 198).

The proper expenditure of the revenue is secured as follows : “The whole revenue is paid into the bank to the credit of the Government. Grants are then made by Consolidated Funds Acts or the Appropriation Act. Then follows an Order under the Royal Sign Manual countersigned by two Lords of the Treasury directing the Treasury Commissioner to transfer the moneys granted to the credit of the Government Department requiring same. The Treasury Commissioners then send an authority to the Comptroller and Auditor-General, who, after being satisfied that there is statutory authority for the grant and that all statutory requirements have been complied with, issues a formal direction to the bank to pay the money to the Departments wanting the same. The bank pays over the money and the Departments can then spend it.”

CHAPTER XXXVI.

PROCEDURE IN THE COMMONS.

Order of business.—The usual order of business in the House of Commons is as follows :—(1) Private business ; (2) public petitions orally presented ; (3) questions ; (4) motions for adjournment under Standing Order 10 ; (5) matters taken at commencement of public business ; (6) orders of day and notices of motions (Manual of Procedure, p. 43).

It is to be noted that “every matter is determined in both Houses upon questions put by the Speaker and resolved in the affirmative or negative, as the case may be,” *e.g.*, “That this Bill be read second time” (May, 11th ed., p. 277).

Apart from ordinary legislation, the main work of the House of Commons is financial. The theory of the Constitution with regard to finance is clearly shown in the special enacting formula of the annual Finance Acts. It runs as follows :—“Most gracious Sovereign, We, your Majesty’s most dutiful and loyal subjects, the Commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled, towards raising the necessary supplies to defray your Majesty’s public expenses, and making an addition to the public revenues, have freely and voluntarily resolved to give and grant unto your Majesty the several duties hereinafter mentioned ; and do therefore most humbly beseech your Majesty that it may be enacted, and be it enacted by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows.”

As soon as the debate on the Address is finished, committees of the whole House, called the “Committee of Supply” and the “Committee of Ways and Means” are formed, and the estimates for the ensuing year are brought before the Committee of Supply. The estimates are divided into naval, military and civil. Twenty days are allocated for their discussion, with a possible addition

of three days if the business of the session permits. After the conclusion of the allotted time, the estimates are voted on without discussion. When the estimates are under discussion, members cannot move an increase; and if, as is usually the case, members desire increased expenditure on some particular subject-matter, this has to be done under the form of a motion to reduce the salary of the Minister in charge of the estimate.

The duties of the Committee of Ways and Means are to authorise grants out of the Consolidated Fund, and to vote the necessary taxes for the year. The financial year commences on the first of April, and the Chancellor of the Exchequer usually makes his financial statement, commonly called the Budget, somewhere near that date. When the Budget resolutions have been passed, fixing the new taxation for the year, they are afterwards embodied in the Finance Act, and the allocation of the revenues of the country made in Committee of Supply are afterwards embodied in an Act called the Appropriation Act. As this Act is only passed towards the end of the session, and the Treasury require money for the service of the State in the meantime, they are authorised to obtain the necessary funds by means of Acts known as the Consolidated Funds Acts (May, 11th ed., ch. 22; Ilbert, *Manual of Procedure*, ch. 10).

A certain amount of the time of the Commons is spent in passing resolutions, which, in more or less abstract terms, point to future legislation, and the House may find itself embarrassed by having assented to a principle when the matter afterwards comes up in the concrete form of a bill.

Public petitions.—The following rules must be observed :—
(1) They must be written and not printed, lithographed, or typed; (2) they must be addressed to the House of Commons; (3) if not in English, they must be accompanied by a translation, for the correctness of which the introducing member is responsible; (4) there must be neither interlineations nor erasures; (5) the petitions must conclude with prayers; (6) they must be signed by the petitioners if they are neither ill nor incapable of signing; (7) no documents must be annexed to petitions; (8) they must be temperately and also respectfully worded; (9) no references must be made to debates in Parliament or to

notices of motion not set down in the paper; (10) the introducing member is responsible for all rules relative to petitions being observed; (11) no petitions for any sums relating to the public service, or for any money which is to be charged on Indian revenue, can be presented without leave of the Crown (Manual of Procedure, p. 53); (12) petitions for leave to compound Crown debts will not be received without a certificate giving certain information to the House (see Standing Orders 66, 68, 70); (13) no member is permitted to present his own petition, but he may present a petition signed by himself in a representative capacity; (14) all petitions presented to the House lie on the table, and are referred to the Public Petitions Committee (cf. May, 11th ed., p. 525).

In the case of *Lake v. King* it was decided that no action for libel lies with respect to the contents of a parliamentary petition (19 & 20 Car. II.; 1 Saunders, 120).

Questions.—Unless the Speaker gives special leave, written notice of intention to ask a question must be delivered to the Clerk of the House at the table beforehand.

Where an answer by word of mouth is required an asterisk is affixed to the notice (May, 11th ed., p. 252).

In all cases where there is no asterisk, or the member or some friend of his is not in the House to ask the question, or the question is not reached by 3.45 p.m., the Minister who has to answer it has the answer printed and circulated with the votes. The questioning member may, however, postpone his question. The time for asking the question is signified by the Speaker, who calls out the name of the questioning member (*ibid.*, p. 252).

No question should contain any unnecessary name or statement, and the questioning member is responsible for the correctness of any statement of fact. Opinions must not be asked, and purely legal questions are not allowed; nor may a question refer to any debate that has occurred, or answer that has been given, in the current session. No imputations on private character are permitted, but imputations on official character may be made with certain reservations. No questions can be put as to matters pending in a committee till the report of that committee is issued. No argument or irony is permitted, and the

Speaker is sole judge of the propriety of a question (for further particulars, see *Manual of Procedure*, pp. 56—62 inclusive : May, 11th ed., pp. 249—252).

A Minister may decline to answer a question on the ground of public policy, and the Minister for Foreign Affairs has great latitude given him. All questions directed to Ministers must relate to their respective departments (cf. May, p. 228, 11th ed.).

Absence and retirement.—All members are supposed to attend Parliament regularly, and no member may shirk a committee for which his name is down unless a very good reason be assigned.

There must be a quorum at every committee. Formerly members were paid for their attendance, and they forfeited their remuneration if absent. The fact that every member was at his place used to be ascertained by a roll call, but the roll call has long been obsolete, and an annual salary not dependent on attendance has taken the place of wages. When a member wishes to retire permanently, he applies for some post of nominal profit, like the stewardship of the Chiltern Hundreds, which vacates his seat in Parliament. Leave of temporary absence can be obtained on motion by the member desirous of absentsing himself, or by someone else on his behalf.

Royal communications.—These are delivered (1) by speech from the Throne to both Houses. The speech is delivered in the Lords, either by the King or the Lord Chancellor (*Manual of Procedure*, pp. 6—8); (2) by Lords Commissioners under the Great Seal at any time.

In the Commons, messages are delivered (1) under Sign Manual; (2) through a Minister; (3) through a Privy Councillor.

Royal messages under Sign Manual are sent to announce some event of importance or sudden emergency, necessitating the calling out of reserve forces, or to request provision on account of some person having rendered valuable services to the Crown, or to request a marriage provision for a royal prince or princess (May, 11th ed., p. 446).

The message is brought by a Minister, who informs the Speaker of his mission and then brings it to the Chair. Whilst the Speaker reads the message, members uncover their heads. Notification of a royal bereavement is also of a formal character.

Informal messages are delivered either by a member of the Household, *e.g.*, reply to an address, or a Minister of the Crown. Members do not uncover when such messages are delivered.

Rules of debate.—No reference must be made to debates in the Upper House, nor to any matter *sub judice* in a law court.

The name of the King must not be mentioned either disrespectfully or in order to influence the House (May, 11th ed., p. 328).

No treasonable or seditious words are allowed, neither may a person speak to obstruct business (*id.*, p. 328).

Members must not be referred to by name, and no offensive expressions against members may be indulged in or personal charges made. No debate of the session must be referred to, neither any question not then under discussion (Manual of Procedure, p. 127; May, 11th ed., ch. 12).

A member may refer to notes, but must not read his speech (Manual of Procedure, p. 126).

Committee of selection.—This committee consists of eleven members chosen by the House at the commencement of a session.

The principal functions of this committee are to classify or divide into appropriate groups all private bills, and to appoint the select committee to try each private bill.

They also nominate members of the standing committees, and in certain cases only members of other committees (Manual of Procedure, p. 93; May, 11th ed., p. 745).

Railway and canal bills committee.—As to these bills this committee performs similar functions to the committee of selection. The members of this committee are chosen by the committee of selection.

The committee is composed of eight or nine members, and three members form the necessary quorum for business (Manual of Procedure, pp. 92, 94).

Police and sanitary committee.—This committee is also nominated by the committee of selection.

It gives its attention to private Bills relating to sanitary matters and matters of police (*ibid.*, p. 96).

Committee of privileges.—This committee is appointed each session to consider matters relating to the ancient privileges of the House (Manual of Procedure, pp. 7, 8, 92, 95).

The joint committee.—This committee consists of an equal number of members from each House. The sittings are fixed by the Lords. It takes cognisance occasionally of public and private bills and also hybrid bills; but where a bill is either public or hybrid it must subsequently be considered by a committee of the whole House (*ibid.*, pp. 90-91).

Committee of public accounts.—This committee is charged with the examination of public accounts submitted by the Comptroller and Auditor-General. It consists of eleven members nominated at the beginning of the session (Manual of Procedure; cf. May, 11th ed., p. 597).

Select committees.—The scope of an inquiry into a matter by a select committee is determined by the order creating it, but the powers of the committee may be increased or curtailed afterwards by the House (Manual of Procedure, pp. 82, 83). Select committees can, if empowered by the House but not otherwise, order the production of documents, compel the attendance of witnesses, and force them to answer questions on oath. When witnesses are disobedient they can be attached for contempt by the House (*Howard v. Gossett*, Car. & M., p. 380). The chairman has a casting vote. Not more than fifteen members may be appointed to serve, and the quorum is determined by the House itself (Manual of Procedure, p. 84). Threatening persons giving evidence before a select committee is a misdemeanour punishable under the Witnesses (Public Enquiries) Protection Act, 1892. Giving false evidence is perjury (*ibid.*, p. 209). An oath as to absence of interest has to be taken by each member of a select committee before acting. (For further particulars see May, 11th ed., ch. 15).

Local legislation committee.—This is a committee appointed each session by the House of Commons. Its business is to consider private bills promoted by local authorities, in cases where

such bills confer on a locality powers in relation to local government which conflict with the general law.

Count-out.—When forty members are not present either in debate, or in a committee of the whole House, the Speaker or Chairman, if satisfied of that fact, gives the order for withdrawal of strangers, and for the summons of members from other parts of the building. Two minutes are allowed to get members together. The members are then counted twice, and if less than forty are there at the time of the second count the House adjourns. There is no count-out at dinner time.

Censures.—When a member contumaciously declines to take the ruling of the Speaker, or is guilty of misbehaviour, or flagrantly breaks the rules of the House, the Speaker may be asked to name him. The question is then put that the member be suspended from the service of the House, and if the motion is carried he is suspended till the end of the session or further order (cf. May, 11th ed., ch. 12).

CHAPTER XXXVII.

*ORIGIN OF MEMBERSHIP OF THE COMMONS AND PERSONS
INELIGIBLE FOR MEMBERSHIP IN THE COMMONS.

Origin of membership of the Commons.—After the Conquest till the signing of John's Magna Charta the qualification for attendance at the Great Council was tenure *in capite*. The earliest symptom of representation was in 1213, when the sheriffs summoned to the Great Council four men and the reeve from every township (Langmead, 7th ed., p. 193).

In 1254 two knights were summoned from each county to vote an aid for the expenses of the French war. In 1261 the rebel barons summoned three knights from each county to a council held by them at St. Albans, *secum tractaturos super communibus negotiis regni* and the King summoned the same knights to Windsor. Simon de Montfort summoned to his Parliament in 1265 two knights from each county, two citizens from each city, and two burgesses from each borough. To Edward I.'s Model Parliament the clergy, consisting of the two archbishops, the bishops and heads of monasteries, were summoned by special writ: Archbishops and bishops were to bring with them deans, archdeacons, canons and inferior clergy. Seven earls and forty-one barons—by no means a fair proportion—and two knights from each county, two citizens from each city, and two burgesses from each borough were also summoned. The three estates thus convened voted taxation separately. The precise date of the division of Parliament into two Houses is difficult to fix. At first the knights and barons sat together. Later on we find the knights, though sitting apart from the burgesses, joining with them in petitions. From 1347 knights and burgesses formed one House and were known as the Commons (*ibid.*, p. 212).

The knights were elected in the county court, first by free-

holders, afterwards by freemen, and in the reign of Henry VI. by freeholders of land of a yearly value of 40s. and upwards.

From an early date the members and voters for counties had to be resident therein (8 Hen. VI., c. 7), and by a statute of Henry V. borough members had to be resident within the borough (1 Hen. V. c. 1). But these provisions were from an early period evaded. By the statute 46 Edw. III. no lawyer practising in the King's Court, and no sheriff during his term of office, was to be admitted to Parliament. The reason was that, as far as lawyers were concerned, it was desirable to prevent them from presenting petitions on behalf of their clients. This statute also was early evaded. By 8 Hen. VI. c. 7 it was provided that county members should be "gentlemen born, as shall be able to be knights," and no yeoman was to sit in Parliament. This meant that no one could sit in Parliament unless he held land of the value of £20 a year and upwards.

By 9 Anne, c. 5, members for counties had to be owners of freehold or copyhold land of the value of £600 per annum or upwards (Langmead, p. 277), and borough members had to own freehold or copyhold land of the value of £300 per annum or upwards.

By 1 & 2 Vict. c. 48 county members possessing personalty yielding £600 per annum or upwards, and borough members £300 per annum or upwards, were admitted to Parliament, and by 21 & 22 Vict. c. 26 the property qualification, which had been frequently evaded, was abolished. Quakers were allowed to sit in Parliament owing to an affirmation being substituted for an oath in 1833. In 1829 the Catholic Emancipation Act threw open Parliament to Roman Catholics, and Jews were admitted in 1858, the form of oath being altered to satisfy their religious scruples.

Chief disqualifications from membership.

1. Aliens (who have not been naturalized according to the Naturalization Acts, 1870 and 1917, or otherwise).

2. Bankrupts.—The bankrupt's ineligibility is regulated by section 33 of the Bankruptcy Act, 1883, which states that when a member is adjudged bankrupt, and the disqualification is not removed within six months from adjudication, the court shall

certify the fact to the Speaker, and thereupon the seat shall be vacant. Where a seat thus becomes vacant, the Speaker during a recess, whether by prorogation or adjournment, shall, on receipt of the certificate, cause notice thereof to be published in the "London Gazette" and six days thereafter (unless Parliament previously meet) issue his warrant for a fresh election writ. The disqualification is removable if and when (a) the adjudication is annulled; (b) the debtor receives his discharge from the court, with a certificate that bankruptcy arose from misfortune and not misconduct. Bankruptcy adjudications may be annulled (a) when the court thinks no adjudication ought to have been made; (b) when the debtor pays up in full.

3. Bankruptcy officials (see Bankruptcy Act, 1883, s. 116).

4. Barristers appointed to try disputed municipal election petitions (45 & 46 Vict. c. 50, s. 92).

5. Clergy of English Established Church (41 Geo. III. c. 63).

6. Clergy of Scotch Established Church (*ibid.*).

7. Clergy of the Roman Catholic Church (10 Geo. IV. c. 7, s. 9).

8. Commissioner of Metropolitan Police (19 & 20 Vict. c. 2, s. 9).

9. County Court judges (51 & 52 Vict. c. 43, s. 8).

10. English and Scottish peers (39 & 40 Geo. III. c. 67).

11. Felons, unless they have served their time or have received a pardon (33 & 34 Vict. c. 23, s. 2).

12. Governors of colonies (6 Anne, c. 41, s. 4).

13. Governors of Indian dependencies (10 Geo. IV., c. 62, ss. 1, 2).

14. Holders of pensions at the pleasure of the Crown (6 Anne, c. 41, s. 4, and 1 Geo. I., c. 56). This does not include civil service or army pensioners or diplomatic service pensioners. Holders of any contract with the Crown (22 Geo. III. c. 45). Company directors holding Government contracts can sit in Parliament.

15. Infants (7 & 8 Will. III. c. 25, s. 7). Sir William Anson says that Mr. Charles James Fox and Lord John Russell sat in Parliament during infancy (vol. 1, p. 79, 3rd ed.; cf. May, 11th ed., p. 27).

16. Irish peers. These peers may sit for English constituencies, unless they be life elected peers of Ireland (Feilden, p. 146; May, 11th ed., pp. 12, 80).

17. Judges of Court of Appeal and High Court of Justice (Judicature Act, 1873, s. 5).

18. Lunatics and idiots.

19. Revising barristers (England), so far as their districts are concerned (6 & 7 Vict. c. 18, s. 28).

20. Recorders, as regards their own boroughs (45 & 46 Vict. c. 50, s. 163).

21. Sheriffs, as to their counties (Rogers 2, 18th ed., p. 6).

22. Stipendiary magistrates in London (*ibid.*, p. 22).

23. Persons convicted of treason (33 & 34 Vict. c. 23, s. 2).

6 Anne, c. 41, s. 25, enacts that no holder of an office of profit created since October 25, 1705, nor any person holding a pension from the Crown during pleasure, shall be capable of being elected to or sitting in the Commons; but section 25 qualifies this by saying that if any person, being chosen a member of the Commons, shall accept of any office from the Crown during membership, his election is void, but that he shall be capable of being re-elected "as if his place had not become void as afore-said." The Act of Settlement excluded all office-holders from Parliament; and had it not been for this later enactment the Ministers of the Crown could not have been in Parliament. Section 27 of the Act of Anne exempts from its provisions officers of the Army and Navy. As regards offices of profit created since 1705, the statutory provisions are numerous, and the acceptance of office, in some cases, not only vacates the seat, but also disqualifies the holder from re-election. Since 1919 a member is not to lose his seat by reason of acceptance of an office of profit under the Crown if that office is an office the holder of which is capable of being elected to or voting in the House and if such acceptance has taken place within nine months of the proclamation summoning a new Parliament (Re-election of Ministers Act, 1919 (c. 2), s. 1).

Where before or after the passing of this Act a privy councillor has been or is appointed to be a Minister of the Crown at a salary without any other office being assigned to him he shall not, by

reason thereof, "be deemed to have been or to be incapable of being elected to or voting in the Commons (*ibid.*, s. 2).

Persons guilty of corrupt and illegal practices.—Where a person has been convicted of personally committing or being privy to personation or bribery, such person can never sit for the constituency to which the offence relates, and if he is already elected such election is void. He cannot sit for another constituency for seven years after conviction (46 & 47 Vict. c. 51, s. 4).

Where a person has been convicted of bribery, treating, personation or undue influence in reference to any election, he cannot sit in Parliament till seven years after conviction, or for the constituency ever (*ibid.*).

Where a candidate has been reported of having innocently through his agents committed the offences of personation, bribery, treating, or undue influence, he cannot sit in Parliament for seven years, unless the election judges, on proper evidence being adduced, exonerate him from all blame (*ibid.*, ss. 22, 23).

Where a candidate has been reported as being guilty of an illegal practice, or with having been privy thereto, he cannot sit in Parliament for the particular constituency for seven years; and if he has been elected the election is void. When the above offence has been committed by an agent of the candidate without his privity, the candidate cannot sit for the particular constituency during the then sitting Parliament (*ibid.*, s. 11) (a).

(a) Candidates for Parliament who do not act for themselves have agents, and besides the regular agent who is usually employed, the candidate very often employs the services of persons who offer gratuitous help in the election, and for all these persons he is answerable. Lush, J., said in the *Harwich Case* (1880), P. 227, that "a person may become an agent by actual employment, and by recognition and acceptance of what has been done."

The agent can only bind the person for whom he acts, and he only binds the principal when he is acting within the scope of the authority; ergo, if such agent is to canvass a particular section of voters, and exceeds his authority, then what he does in excess of his authority does not concern the principal (Ward's Practice at Elections, p. 148).

CHAPTER XXXVIII.

THE PARLIAMENTARY FRANCHISE.

The county franchise.—The county electors were originally the freeholders who attended the County Courts, and these freeholders were divided into two classes : (a) tenants in chief ; (b) other freeholders. Attendance at the courts was a questionable privilege which fell to the lot of the holder of a particular piece of land. New pieces of land were, owing to *subinfeudation* and other kinds of transfer, split up gradually into numerous sections, but there was no increase in the number of suits due to the County Court (Maitland, p. 88). Those who owned the split-up sections settled between themselves who was to go to the County Courts.

Now the persons who, owing to bargains or otherwise, were bound to attend the County Court voted for the knights of the shire who went to Parliament. The greater and lesser barons were the only persons consulted originally as to taxation or otherwise, but in the reign of Edward I. the county franchise was vested in the freeholders who attended the County Court.

In 1430 the county franchise was regulated by 8 Hen. VI. c. 7, which provided that knights of the shire were to be elected by freeholders who owned land of the clear yearly value of 40s. or upwards, residence in the county being indispensable (a).

The borough franchise.—The borough franchise has been described as an Augean Stable till the passing of the Reform Act, 1832. It was a good field for corruption and the Crown and its adherents could easily command a majority. Originally, the borough franchise was regulated on a more or less democratic basis (see Langmead, p. 278). Members, and persons who were sub-

(a) Mr. Langmead mentions an Act of Henry IV. to the effect that all freemen might vote for a knight of the shire for Parliament (Langmead, p. 273). The restriction of residence appears to have been gradually evaded, but was not abolished till 1774 (14 Geo. III. c. 58).

ject to scot (municipal impositions) and lot (liability to hold municipal offices) had the franchise, but gradually encroachments on the right of election were made and prescriptive rights arose.

The Tudors inaugurated a system of granting charters of incorporation to boroughs, and these instruments specified who were to elect the borough member, or members. Sometimes members were elected by a Crown-chosen mayor and corporation. Obscure villages received corporate rights. The borough of Old Sarum, for instance, consisted of a ploughed field.

To sum up:—in the provincial towns at the time of the Reform Act the franchise was regulated in four different ways. It belonged to:—

1. Burgage tenants; or
2. Freemen of the borough or guild; or
3. Householdors liable to scot and lot; or
4. Borough corporations (Feilden, p. 1).

By a statute of Henry V. residence was essential to a borough vote, but this requirement was gradually evaded and was repealed by a statute of 1774. Tudors and Stuarts granted numerous charters, thus vesting the franchise in a select few upon whom the Crown could rely.

A bill for reforming the franchise was proposed by Wilkes in 1776, and a similar measure by the Duke of Richmond shortly afterwards. After this Grey, Sir Francis Burdett, and Lord Russell introduced Reform Bills without results. In 1831 the Reform Bill was thrown out by the Lords. It was reintroduced in 1832 and became law owing to William IV. threatening to create peers.

By the Reform Act, 1832, the following changes were made. The old forty-shilling freeholder lost his vote unless he occupied the qualifying property or had an heritable estate therein or had acquired such estate by marriage, marriage settlement office, devise, or promotion to benefices, or had a life estate of a clear yearly value of £10 or more. Copyholders (legal or equitable) of heritable estates of the yearly value of £10 obtained the franchise, and lessees, sub-lessees, and assignees of land of the yearly value of £10 or more holding for terms of years originally

created for sixty years or more, and also lessees, sub-lessees and assignees of land of the clear yearly value of £50 or more whose terms were created for a period of not less than twenty years, and also leaseholders paying a rent of £50 or upwards, became entitled to the parliamentary vote.

A £10 occupation franchise was (subject to certain restrictions as to previous residence and payment of rates) conferred on certain inhabitants of boroughs.

By the Reform Act, 1867, the £10 qualification as to counties of tenants for life of freeholds, copyholders and leaseholders was reduced to £5, and a £12 occupation franchise (subject to restrictions as to occupation and payment of rates) was introduced. As to boroughs, two new franchises were created, viz., occupation of a dwelling-house of any value, and the lodger qualification in respect of lodgings of the rateable value of £10, if let unfurnished. Eleven boroughs were disfranchised and twenty-three boroughs deprived of a member. Additional boroughs were created, the county seats were increased and certain university seats were called into existence.

By the Representation of the People Act of 1884 the lodger and householder qualifications were extended to counties, and a service qualification, giving the vote to people who occupied houses in the capacity of servants, was created.

The present parliamentary franchise.—Under the Representation of the People Act, 1918, a man to be registered as a voter must (1) be a British subject natural-born or naturalized; (2) be twenty-one years of age; (3) labour under no legal incapacity (section 1).

By legal incapacity is meant “some quality inherent in a person or for the time being irremovable in such person, which, either at common law or by statute, deprives him of the status of a parliamentary elector” (Fraser, *Representation of the People Acts*, p. 4).

The following are subject to legal incapacities : (1) Aliens not naturalized; (2) infants; (3) holders of certain offices (see Fraser, p. 5, for further particulars); (4) lunatics, save in lucid intervals; (5) idiots (*Burgess's Case*, Bedfordshire (1785), 2 Lud. 567); (6) imbeciles (*Oakhampton* (1791)); (7) English

peers; (8) Scotch peers and Irish peers, unless elected or serving for a British constituency; (9) traitors and felons, unless they have endured their punishment or have been pardoned; (10) persons who have been found guilty within the last seven years of corrupt practices at a parliamentary election; (11) persons who have been found guilty of the like conduct at a municipal election; (12) certain persons who have been found guilty of illegal practices at parliamentary, municipal and certain other local elections, for five years after conviction.

A man to obtain a vote must be on the register of voters and the fact of being on the register is, in the absence of evidence to the contrary, conclusive of the right to vote. A man to be registered as a parliamentary elector in a constituency must have either the requisite residence or the requisite business premises qualification (section 1, sub-section 1A). In order to possess the requisite residence qualification he must be residing in premises in the constituency on the last day of the qualifying period, and he must further have resided in premises in or near the constituency (*b*) throughout the qualifying period.

In order to possess the requisite business premises qualification he must on the last day of the qualifying period be occupying business premises in the constituency, and he must further during the whole of the qualifying period have occupied business premises in or near the constituency.

The qualifying period is a period of six months, ending January 15 or July 15 in any given year.

“Business premises” means land or other premises of the yearly value of £10 at least occupied for purposes of a business, profession or trade.

A man can be registered as an elector for an English university constituency if he is of full age, is not subject to legal incapacity and has taken a degree (not honorary), at such university (section 2).

The section also deals with voting for Scotch and Irish universities.

A woman can be registered as an elector if (a) she is over thirty years of age (section 4); (b) is not subject to legal incapacity;

(b) The degree of proximity necessary is set out in section 1 (2) (b).

(c) could be registered as a local government elector if she were a man. (Section 3 provides that a man can be registered as a local government elector if he is on the last day of qualifying a person occupying as owner or tenant land or premises in a local government electoral area and has during the whole of the qualifying period occupied land or premises in that area, or, if that area is not an administrative county or county borough, then in any area, county or county borough in which the area is wholly or partly situate.) Provided that for the purposes of this section a man who himself inhabits any dwelling-house by virtue of any office, service, or employment shall, if the dwelling-house is not inhabited by his employer, be deemed to be a tenant or occupier of the dwelling-house. A married woman over thirty is entitled to be registered as a voter provided her husband is so entitled.

A woman can be registered as a university parliamentary voter if she is over thirty and has either obtained a degree or has fulfilled the conditions required of women in the university in question as to residence, and has passed all the examinations, which would entitle a man at that university to a degree.

Persons on war service shall be entitled to be registered for any constituency for which they might have been registered but for such war service, but when the right relates to a residence qualification they must make a special claim, together with a declaration in special form, that they have taken steps to prevent registration in another constituency. The declaration is to be presumptive evidence of their right to registration. "Serving on war service" means serving on full pay in the Army, Navy or Air Force, or being abroad or afloat in connection with any war in which His Majesty is engaged.

Service of a military or naval character is to count as war service, also Red Cross service, and being engaged in any employment recognised by the Admiralty, Army Council, or Air Service as work of national importance.

Occupation of business premises means premises of the value of £10 for men and £5 for women, and joint occupiers, if men, must pay £10 each and women £5. The residence qualification is not interrupted if a house is let furnished for not exceeding four months, or where landlord has demanded possession.

A person on the register is entitled to a vote, but no person, whether male or female, may have more than two votes, one of which must be a residence vote; *e.g.*, if a person has a university vote, a business vote, a London livery vote, and a residence vote, he may vote only twice though he is on four registers, and one of the two votes which he exercises must be a residence vote. (section 8, sub-section 1).

Receipt of poor relief or other alms is no longer a disqualification for voting.

Conscientious objectors to military service could not vote until five years after the termination of the late war, but they were allowed to vote by taking certain steps with special permission and supplying certain evidence to the Central Tribunal.

Registration.—Two registers of electors are prepared each year, *viz.*, the Spring and Autumn registers.

The Spring register comes into force on April 15 and remains in force till October 15, and the October register comes into force on October 15 and remains in force to April 15.

If for any reason a new register is not compiled every six months the previous one is to be treated as in force.

Every parliamentary borough or county is to be a registration area and the clerk of the county council is to be registration officer, and the borough town clerk is to be registration officer for the borough, and when there is a vacancy in the offices above mentioned, either the mayor of the borough or the chairman of the county council is to appoint a proper person to act. The registration officer has judicial duties as well as that of preparing and publishing lists of voters. Any person may send notice to such officer objecting to another person's being on the list, and the clerk then notifies the person whose registration is objected to, and a date should be fixed for the clerk to hear both sides.

If either party is dissatisfied with the ruling of the registration officer, he can appeal to the county court judge, and there is an ultimate right of appeal to the Court of Appeal. Pending an appeal, the person thereby affected may vote. It shall be the duty of the officials of the Appeal Court to notify the registration officer of the result of any appeal.

An official who intentionally omits to insert in the register the name of a person entitled to vote commits an indictable offence (*R. v. Hall*, [1891] 1 Q. B. 747).

In lieu of the county court judge the Lord Chancellor may appoint an assistant judge to hear appeals, and such judge shall have the full powers of a county court judge for that purpose.

Freedom of the City of London.—Freemen of the City of London who are liverymen of one of the City companies may be placed on the register of liverymen (section 17), but cannot have more than two votes.

University registers.—The governing body of a university are to keep a register of persons entitled to a vote for their constituency, and shall allow inspection of their register (section 19).

Absent voters.—Persons who are entitled to registration as parliamentary electors may, not later than February 18, or for the Autumn register August 18, in any given year, claim to be placed on an absent voters' list, and the registration officer, if satisfied that there is a probability that the claimant, by reason of his occupation, service, or employment, may be debarred from voting during the period the particular register is in force, shall place his name on the absent voters' list, and the officer is bound to place in such list without any claim being made persons in the Army, Navy or Air services (Schedule 1 to Act, rr. 16, 17, 18).

The addresses of absent voters must be kept and proper instructions as to the mode of voting sent to them (*ibid.*, r. 19).

The registration officer may require from any household any necessary information, and the giving of false information constitutes a summary offence.

By section 20 the principle of proportional representation is to be applied at contested elections for university constituencies where there are two or more members to be elected. It may also be applied in certain other constituencies returning three or more members if and when a scheme for the selection of these constituencies is approved by Parliament. But no such scheme has been approved so far. In either case the principle of proportional

representation is operated by conferring on each elector one transferable vote (c).

Elections.—At a general election all polls shall be held on the same day.

Every candidate for Parliament is to deposit £150, and if he fails to do so his candidature is forfeited, and if the candidate dies before the election the money deposited is to be returned to his legal personal representative.

If a candidate, who has made the required deposit, is not elected and the number of votes polled by him does not exceed, in the case of a constituency returning one or two members one-eighth of the total number of votes polled, or in the case of a constituency returning more than two members one-eighth of the number of votes polled divided by the number of members to be elected, the deposit shall in each case be forfeited to the Crown; in other cases the amount shall be returned to the member elected so soon as he has taken the statutory oath of allegiance, and to the person not elected as soon as possible.

Where, again, a candidate is nominated in more than one constituency he can recover only one deposit.

The division of the constituency into polling districts rests with the registration officer, as does the appointment of polling places.

Scale of election expenses.—A candidate may send to each elector one free postal communication.

Unauthorised persons are guilty of a misdemeanour if they incur expenses on account of holding public meetings or issuing advertisements or circulars to procure election of a candidate—unless authorised in writing to do so by the election agent.

The fourth schedule to the Act provides for a limited maximum scale of election expenses, which must not be exceeded.

Section 37 and Schedule 9 deal with the redistribution of seats, and the total number of members of the Commons is by these provisions raised from 670 to 707. This total has now been

(c) For definition of the expression "transferable vote," see section 41 (6).

reduced to 615 by the operation of the Government of Ireland Act, 1920, and the Irish Free State Constitution Act, 1922. The Act applies to Scotland, with the modifications set out in sections 43 and 44 respectively.

History of right of Commons as to control of elections.—The sheriffs, acting under the Crown, formerly controlled elections. The writ directed the sheriff to return two knights for each county and two burgesses for each borough, and the sheriff had the selection of the places which he considered ought to have members.

The boroughs shirked representation, as they had to pay 2s. per day to each burgess. The first Statute of Westminster declared that elections ought to be free, and an Act of Richard II. fined sheriffs who omitted to make returns of boroughs which had previously returned members. Mediæval sheriffs made false returns of men not properly elected.

An Act of Henry IV. gave two justices of assize power to enquire into disputed returns, and an Act of Henry VI. awarded additional fines for false returns, and enjoined the sheriff to send precepts to mayors and bailiffs of boroughs directing them to elect borough members (Langmead, pp. 267, 268).

The King and Council formerly settled election disputes, and as early as the reign of Richard II. the Commons remonstrated against this course of action. During the Lancastrian period the Commons continued to remonstrate, but there is no recorded instance of their further complaining till the reign of Elizabeth, when they protested against the county of Norfolk election. James I. interested himself much in the kind of men who were to be elected, as is evidenced by his proclamation at his first Parliament, and in this reign the famous *Goodwin Case* occurred. In 1604 Goodwin was returned for Bucks, but the Clerk of the Crown vacated the return on the ground that he was an outlaw. A second writ was issued and one Fortescue was elected, but the Commons disputed Goodwin's outlawry, and contended that in any event outlawry did not disqualify him. The Crown and the Commons consented to submit the dispute to the judges, but no reference took place. Finally, James I. admitted the right of the Commons to settle election controversies. The Commons

also claimed to settle the rights of electors, and this gave rise to the celebrated episodes of *Ashby v. White* and the *Aylesbury Men* (see p. 299).

After *Goodwin's Case*, Select Committees of the Commons for a time tried the issues on disputed elections, but in 1672, according to Anson, a committee of the whole House tried these cases; and decisions were not arrived at on the merits but on party lines. It is noteworthy that Walpole's Ministry resigned owing to being outvoted in the Chippenham Election Petition.

In 1770, Grenville's Act (10 Geo. III. c. 16) was passed to secure impartiality. Forty-nine members were chosen by lot, and then the petitioner and the respondent each struck out a name in turns until the number was reduced to thirteen, and then each nominated a member. This committee could compel the attendance of witnesses and examine them on oath. By Peel's Act, in 1839, the number of the committee was reduced to six. By the Parliamentary Elections Act, 1868, jurisdiction as to disputed elections was handed over to the Common Pleas Court, proper safeguards being added to secure to the Commons their privileges; and by a subsequent Act this jurisdiction was, with the like safeguards being preserved, committed to two judges of the High Court. The judges report the facts to the House, and the Commons can then decide the case. Cases where the member has no right to a seat are still in the hands of the Commons.

APPENDIX A.

I.

CONSTITUTION OF NORTHERN IRELAND AND OF THE IRISH FREE STATE.

In the autumn of 1914 the Government of Ireland Act, 1914 (c. 90), conferring a modest measure of autonomy on Ireland, was placed on the Statute Book by the Government of the day. An Act was passed on the same day suspending its operation until the end of the war. As the Act was never carried into effect it is unnecessary to deal with its provisions.

In 1920 followed the Government of Ireland Act of that year (c. 67), which, unlike the earlier Act, conferred separate Parliaments with limited legislative powers on "Northern" and "Southern" Ireland, Northern Ireland consisting of six counties of Ulster, and Southern Ireland of the rest of the country. So far as Southern Ireland is concerned the Act remained in practice a dead-letter from its enactment until its formal supersession by the Irish "Treaty" and Treaty Act. The provisions relating to Northern Ireland were put in force, have been preserved by subsequent legislation, and are operative to-day.

CONSTITUTION OF "NORTHERN IRELAND."

The Constitution of Northern Ireland confers upon the Legislature a general power to legislate for the peace, order and good government of Northern Ireland, but excludes the following topics from its legislative competence :—

- (i) the Crown, the succession thereto, and Crown property;
- (ii) the making of war and peace;
- (iii) the navy, the army, air force and territorials;
- (iv) treaties, foreign relations, and extradition;

- (v) dignities or titles of honour;
- (vi) trade (except so far as internal to Northern Ireland), quarantine and navigation, coinage and legal tender, trade-marks, copyright and patent rights, etc., together with any matter declared in the Act to be "reserved."

Reserved matters include :—

1. The control of the Royal Irish Constabulary until the expiration of a defined period.
2. Again temporarily, the Postal Service, Post Office, Savings Banks, etc.
3. Land purchase legislation, until otherwise provided by the Imperial Parliament.

Any law is to be void which

- (a) contravenes the above limitations, or is otherwise repugnant to the Act;
- (b) interferes with religious equality, or confiscates property without compensation.

The executive power continues vested in the King. The Lord-Lieutenant is, as regards Northern Irish services, to exercise such prerogative or other powers as may be delegated to him by the King; and this through departments to be established by Act of the Parliament of Northern Ireland, and presided over by officers appointed by the Lord-Lieutenant: these last are the Ministers of Northern Ireland, from whom the Cabinet is drawn.

Northern Ireland is to return thirteen members to the Imperial House of Commons.

The Legislature of Northern Ireland is to consist of a Senate of twenty-four members elected by the House of Commons of Northern Ireland.

The House of Commons of Northern Ireland is to consist of fifty-two members, elected by the same electors and in the same manner as the members returned for Northern Irish constituencies to the Imperial House of Commons.

Provision is made for quinquennial Parliaments, for the operation of English election laws so far as applicable, and for the right of the House of Commons to originate money bills (the Senate is declared incompetent to amend these), and for dealing

by means of joint sessions with deadlocks arising between the two Houses on fiscal or other measures.

The Act sets up a Supreme Court of Judicature for Northern Ireland consisting of a High Court and a Court of Appeal, to exercise, within the limits of Northern Ireland, the jurisdiction formerly vested in the Supreme Court of Judicature for all Ireland. From the Court of Appeal of Northern Ireland an appeal lies (or lay under the Act of 1920) to the High Court of Appeal for Ireland (a), and thence, subject to the Act, to the House of Lords.

Constitutional questions arising upon the construction of the Act (e.g., the validity of measures passed or proposed by the Parliament of Northern Ireland), if they call for speedy determination, may be referred by the Lord-Lieutenant to the Judicial Committee of the Privy Council.

The Act also conferred on the Parliaments of Northern and Southern Ireland power by identical Acts to set up a single Parliament for all Ireland, and a Council of Ireland was provided for to promote and facilitate this result.

THE IRISH TREATY.

Between the enactment of the foregoing Act and December, 1921, Southern Ireland declined to put the Act in operation and convened a Parliament of their own (the Dail Eireann). On December 6, 1921, after prolonged negotiations, their leaders concluded with the British Government the agreement known as the Irish Treaty. The substance of this Treaty was given statutory effect by the Irish Free State (Agreement) Act, 1922. The Treaty conferred on the Irish "Free State" the status of a self-governing dominion (Art. 1). The type of dominion status conferred was, so far as not defined in the Treaty, to be that of the Dominion of Canada (Art. 2), and the representative of the Crown in Ireland was to be appointed in like manner as the Governor-General of Canada (Art. 3). Members of the Free State Parliament were to swear allegiance "to the Constitution of the Free State as by law established and that I will be faithful

(a) But see 13 Geo. V. c. 2, Sched. I. (6), which abolishes the High Court of Appeal for Ireland.

to His Majesty King George V. . . . by virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations" (Art. 4). The Free State was to assume her fair share of the public debt and of war pensions subject to any just counterclaim available to her : the determination of the sums due to be settled, failing agreement, by arbitration (Art. 5).

The defence by sea of Great Britain and Ireland was to be controlled by the Imperial Parliament pending the conclusion of arrangements by the Free State for her own coastal defence (Art. 6). By Art. 7 the Free State is to afford the Imperial forces in time of peace certain specified harbour and other facilities, and in time of war any facilities those forces may require. Any military defence force established by the Free State is to bear the same proportion to those of Great Britain as the population of the Free State bears to that of Great Britain (Art. 8).

The ports of the Free State and Great Britain are to be open to the ships of the other country on payment of the ordinary dues (Art. 9). Articles 11 and 12 provide that until one month after the statutory ratification of the Treaty the Treaty is to have no application to Northern Ireland, which is to continue subject to the 1920 Act.

Before the expiration of that month the Parliament of Northern Ireland may do one of two things : It may by resolution of both Houses decide to return members to the Free State Parliament ; it may by similar resolution vote itself out of the Treaty arrangements and continue under the 1920 Act. If it resolve in favour of continued exclusion (b) from the Treaty, the resolution is to receive effect, subject to the readjustment of the frontiers of Northern Ireland and the rest of Ireland by a special commission, "in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographical considerations."

If the Parliament of Northern Ireland does not resolve in favour of continued exclusion, it continues to exercise the powers conferred upon it by the 1920 Act. But in that event the Free

(b) This is what it has done.

State Government and Parliament may exercise in Northern Ireland, in relation to matters outside the competence of the Parliament of Northern Ireland, the same powers as it can exercise in the rest of Ireland (Art. 14). The exercise of these powers is to be subject to safeguards to be agreed between the Government of Northern Ireland and the provisional Government of Southern Ireland (Art. 15) (c).

IRISH FREE STATE CONSTITUTION ACT (13 Geo. V. c. 1).

This Act enacts as law a Constitution, drafted by the Dail Eireann sitting as a constituent assembly. The Constitution purports to embody the principles underlying the Treaty, is directed by its powers to be construed with reference to the Treaty, and is declared to be void to the extent of its repugnancy therewith. The draft Constitution and the Treaty are scheduled to the Act (Scheds. I. and II. respectively).

After declaring that all powers of Government are derived from the people (Art. 2), and stating who shall be citizens of the Free State (Art. 3), the Constitution formally secures the liberty of the person and provides that no person is to be deprived thereof except in accordance with law. Nothing in these Articles, however, is to control any act of the military forces in time of war or rebellion. It proceeds to declare inviolable the dwelling of each citizen (Art. 7), freedom of conscience and free profession and practice of religion, subject to public order and morality (Art. 8), freedom of expression of opinion, of assembly, and of association (Art. 9), and the right of every citizen to free elementary education (Art. 10).

The Legislature.—Articles 12 to 50 inclusive deal with the Legislature, or “Oireachtas.” It is to consist of the King and two Houses—the Chamber of Deputies (Dail Eireann) and the Senate (Seanad Eireann). The *Dail* is to be elected, and the “referendum” and “initiative” (d) may be exercised by all

(c) The nature of this provisional Government is explained in Art. 17. In the interval between the Treaty date and the Constitution of the Parliament and Government of the Free State, the existing irregular Parliament of Southern Ireland is to be constituted a provisional Government and is to be endowed with the powers requisite for the discharge of its duties.

(d) See *infra*.

adult citizens of either sex; and the Seanad is to be elected by all citizens of either sex who have reached thirty—subject in each case to the existing electoral law (Art. 14). The oath to be taken by members of the Oireachtas is that provided for in the Treaty (Art. 17). Members are to enjoy the same privileges from arrest, and the same privilege of free speech within the Oireachtas as obtains in the Imperial Parliament (Art. 18), and official reports of proceedings in the Oireachtas are to be privileged (Art. 19). Each House may make, and if necessary enforce by penalties, its Standing Orders, and elect its own officers (Arts. 20 and 21). Members of the Oireachtas are to be paid, and to travel free (Art. 23). The Oireachtas is to hold at least one session a year (Art. 24) and is to sit publicly except in cases of special emergency (Art. 25). Article 26 fixes the minimum and maximum numbers of constituents for representation by one member, and provides that elections shall be upon the principles of proportional representation. At a general election the polls are to be on the same day.

The Seanad is to be composed of citizens over thirty-five years of age who have performed useful public service or possess special qualifications. It is to consist of sixty members elected for twelve years (Arts. 30 and 31), one-quarter being elected every three years on principles of proportional representation (Art. 32). They are to be elected from a panel consisting as to two-thirds of nominees of the Dail and as to one-third of nominees of the Seanad itself (the nomination proceeding in both cases by voting on principles of proportional representation) (Art. 33). Article 35 confers on the Dail exclusive competence with reference to money bills, certified to be such by its chairman. As regards other bills the Seanad may propose and the Dail may consider amendments: but a bill passed by the Dail and considered by the Seanad shall, 270 days after it has been sent up to the latter, be deemed to have been passed by both Houses in its original form, unless this period is extended by agreement (Art. 38).

Royal assent.—The royal assent to a bill passed by both Houses may be given, withheld or reserved by the representative of the Crown on the same principles as those observed in the Dominion of Canada (Art. 41).

The Referendum.—Any bill passed by both Houses other than a money bill or a measure of urgent necessity may, on the written demand of two-fifths of the Dail or a majority of the Senate, be suspended for ninety days, and within that period may be submitted to a referendum (Art. 47).

The Initiative.—The Oireachtas may provide for the initiation of proposals for laws or constitutional amendments by the people. If it fails so to do within two years, and a certain number of citizens petition to that effect, it must either make such provision or refer to a referendum the question whether such provision shall be made (Art. 48).

The Oireachtas may amend the Constitution within the limits prescribed by the Treaty : but after eight years from the Constitution receiving effect the following conditions must be satisfied before an amendment can become law :—

- (1) there must be a referendum ;
- (2) a majority of the registered electors must poll their votes ;
- (3) either a majority of the registered electors, or two-thirds of those who poll, must support the amendment (Art. 50).

The Executive Authority (which is to be exercised as in Canada) is vested in the King, with the assistance of an Executive Council.

This Council is appointed as to not less than five of its members by the representative of the Crown on the nomination of the President of the Council. These, like other members of the Council, must be members of the Dail (Arts. 51 and 52). The Dail nominates the President of the Council, and he nominates a Vice-President. The President appoints those members of the Executive Council who are not appointed by the representative of the Crown. The Ministry is collectively responsible to the Dail and must resign if its support is withdrawn (Arts. 53 and 54). Ministers other than those on the Executive Council are appointed by the representative of the Crown on the nomination of the Dail (Art. 55) ; they are responsible to the Dail alone for the administration of their departments (Art. 56). All Ministers can attend and be heard in the Seanad (Art. 57). The represen-

tative of the Crown is to be styled "Governor-General," and is to be appointed as in the case of Canada (Art. 60).

The Judicature.—The Constitution provides for the establishment by the Oireachtas, in addition to courts of local and limited jurisdiction, of—

- (a) a High Court—a court of first instance for all questions of law and fact, civil and criminal, including the validity of laws having regard to the Constitution;
- (b) the "Supreme Court" of the Free State, with appellate jurisdiction from all decisions of the High Court, including decisions on the validity of laws.

The decisions of the latter are final, subject only to an appeal by special leave to the Judicial Committee of the Privy Council (Arts. 64 to 66).

Judges are appointed by the Governor-General on the advice of the Executive Council, and are only removable by resolution of both Houses. A judge may not sit in the Oireachtas (Arts. 67 to 69).

Article 70 may be set out in full :—

"Article 70.—No one shall be tried save in due course of law and extraordinary courts shall not be established, save only such military tribunals as may be authorised by law for dealing with military offenders against military law. The jurisdiction of military tribunals shall not be extended to or exercised over the civil population save in time of war, or armed rebellion, and for acts committed in time of war or armed rebellion, and in accordance with the regulations to be prescribed by law. Such jurisdiction shall not be exercised in any area in which all civil courts are open or capable of being held, and no person shall be removed from one area to another for the purpose of creating such jurisdiction."

By Article 72 persons charged with criminal offences (other than summary offences) must be tried by jury.

The rest of the Act deals with requirements to be fulfilled before the Constitution can be given full effect, and is of no permanent importance.

By section 3 of the Constitution Act the Free State may adopt any Imperial Act applicable to the self-governing Dominions, while section 4 saves the right of the Imperial Parliament to make laws affecting the Free State in any case where it would, in accordance with constitutional practice, make laws affecting the other Dominions.

By the Irish Free State (Consequential Provisions) Act, 1922 (c. 4), passed simultaneously with the Constitution Act, the 1920 Act is for the most part repealed except in its application to Northern Ireland, and certain other consequential changes are enacted.

The Irish Free State Constitution as a whole has therefore to be deduced from four different instruments: (1) the "draft" Constitution, Schedule I. of the "Constitution Act"; (2) the Articles of the Treaty (Schedule II. of the Constitution Act, and the Treaty Act), which override the draft Constitution where they conflict with it; (3) the main body of the Constitution Act, other than the Schedules; (4) the Consequential Provisions Act: while if Ireland as a whole is regarded, the Constitution has still to be reconciled with such parts of the Government of Ireland Act as remain standing.

The Constitution is in many respects peculiar, if not unique, among colonial Constitutions: (1) It declares a number of abstract rights and liberties after the manner of continental Constitutions (including the right of free elementary education). (2) Neither in the Treaty nor in the scheduled Constitution are the powers of the Free State Parliament specifically defined either by exclusion or enumeration. There are, indeed, casual negative indications of its powers, *e.g.*, it may not endow a religion or maintain defence forces exceeding a certain scale (Treaty, Arts. 8 and 16). On the positive side all we are told is (i) that the Parliament may make laws for the peace, order and good Government of Ireland, and (ii) that the relations between the Free State and Imperial Parliament shall, as a matter of law, practice and constitutional usage, be those which obtain between Canada and the Imperial Parliament. Presumably, then, the Free State is intended to have the same legislative powers as the Dominion Parliament plus the provincial legislations of Canada. (3) While

matters of such importance are but vaguely adumbrated, relatively trivial matters such as free travelling passes for Members of Parliament are specifically provided for. (4) The most up-to-date innovations of constitution-builders are woven into this Constitution, *e.g.*, a Senate elected mainly by the Lower Chamber. It might be to provide safeguards for the supremacy of the Lower House in the event of conflict with the Senate, proportional representation, adult suffrage (male and female), the referendum, and the initiative. (5) The oath of allegiance to be taken by members of the Free State Legislature is, we think, unique in form.

II.

NOTE ON THE SYSTEM OF GOVERNMENT IN INDIA.

It is convenient, in giving a short account of the system of government in India, to consider (1) that system as it existed before the Government of India Act, 1919 (c. 101), and (2) the comprehensive reforms introduced by that statute.

(1) The System as it existed before the Act of 1919.

(1) The system on which the 1919 Act engrafted its reforms is embodied in the Government of India Acts of 1915 (c. 61) and 1916 (c. 37), which consolidated the provisions of the long series of statutes enacted by Parliament from time to time to regulate directly and indirectly the administration of British India, first by the East India Company and later by the Crown.

Under this system the Secretary of State in Council, responsible to the Imperial Parliament, had unlimited power to "superintend, direct and control all acts, operations and concerns which relate to the government and revenues of India." The Government of India had, subject to any directions received from the Secretary of State in Council, superintendence and control over all affairs, civil and military, in India. There were fifteen Provinces in India, each with a local Government. The three

“Presidencies” of Madras, Bombay and Bengal were administered by a Governor and an Executive Council of three members, one Province (Bihar and Orissa) by a Lieutenant-Governor, also with an Executive Council of three members, two Provinces (the United Provinces and the Punjab) by a Lieutenant-Governor without an Executive Council, and six minor Provinces by Chief Commissioners, who were technically agents of the Government of India, though in course of time their status and powers had come to differ little from those of Lieutenant-Governors. As a matter of law the authority of the Government of India in relation to the local Governments was an overriding authority, both legislative and executive, extending to all provincial matters as well as to those affecting India as a whole, the provincial Governments possessing no legal autonomy whatever. Any demarcation, therefore, of separate spheres, legislative or administrative, between the Central Government on the one hand and the Provincial Governments on the other was based, not on a legal distribution of powers, but on practice and convention.

(a) This absence of formal demarcation is the first point to note when considering the effect of the reforms of 1919.

(b) The second point to note concerns finance. Prior to those reforms the “revenues of India” were a single undivided corpus. The Secretary of State was responsible to the Imperial Parliament, and the Government of India was responsible to the Secretary of State, for the expenditure of every rupee of public money in India. Provincial Governments could impose no taxes on their own initiative and had no independent revenues on the security of which to raise loans. In practice a certain proportion of the “revenues of India” were allocated by the Central Government each year to the several Provinces to meet provincial services.

(c) The third point to note is that prior to the 1919 reforms, although there was a Legislative Council associated with the Central Government of India and with each of the nine “major” Provincial Governments, neither in the Government of India nor in the Provincial Governments was the Executive in any degree responsible to its legislative body. Nor were those bodies pre-

dominantly—though it will be seen from what follows that they were to some extent—elective. Originally the legislative authority in India consisted in the Governor-General or the Governor (for at one time only the two Presidencies of Madras and Bombay had legislative powers separate from those of the Governor-General in Council) and their respective Executive Councils, meeting “for purposes of legislation.” The Executive Councils have always consisted, as they still consist, of officials nominated by the Crown. To such meetings the Governor-General (or, as the case might be, the Governor) summoned a limited number of “additional members,” who were in part officials and in part non-officials, but were all nominated by the Governor-General or Governor, as the case might be. Such a meeting could only consider the particular legislative measure or measures with reference to which it was convened. Gradually the “additional members” increased in numbers, and came to be elected instead of nominated by the head of the Provinces. From time to time, also, local legislatures were created in seven other Provinces besides the two Presidencies of Madras and Bombay. Both the Constitution and powers of these legislative bodies were considerably extended by Lord Morley’s Indian Councils Act, 1909 (c. 4), and the rules framed under it.

(i) As to their constitution, the principle of election was recognised as the means of selecting non-official members of all legislative Councils; the numbers both of official and of non-official members were increased, and a non-official (though not an elected) majority provided for in every Province. (ii) As to their powers, it was provided that the local Government might make rules authorising the discussion of the annual financial statement and of any matter of general public interest, and permitting the asking of questions. Such rules recognised the right of the Councils to vote on motions submitted for their discussion.

The Morley Act also resulted in the appointment of an Indian member to the Executive Council of the Viceroy and to all provincial Executive Councils then existent or subsequently created, though there had been no legal bar to such a course previously.

Thus, before the Act of 1919, the provincial Councils, though they had in theory wide power “to make laws for the peace and

good government of the territories for the time being constituting the Province," were greatly limited in their initiative partly by a close control maintained over their legislative proposals both by the Government of India and by the Secretary of State : while in the sphere of finance and of general administrative policy they had no control over the Executive, which was responsible solely to the Crown.

(2) Changes wrought by the Act of 1919.

A. *In the Provinces.*

(a) First, the Act effected a statutory demarcation of the functions to be exercised, in the sphere of administration, between the Central and Provincial Governments and Legislatures. In the legislative sphere no rigid legal demarcation was enacted, the Central Legislature retaining a concurrent power of legislation in provincial matters, though, subject in certain cases to previous sanction, a Provincial Legislature may amend or repeal central legislation in its application to that Province. But rules made under the Act specify certain provincial matters only as a proper field for the legislative intervention of the Central Legislature, and assume that a convention will obtain whereby the restriction so laid down will be strictly observed.

(b) *Finance.*—The sources of the "revenues of India" are by the Act definitely distributed between the Central and Provincial Governments. Within the limits assigned to them, also, the latter can now raise taxes for provincial purposes, and can raise loans on the security of their provincial revenues. Even within those limits, however, the Central Government, with its heavy commitments in respect of defence and other "all-India" services, cannot afford to concede to the Provincial Governments a completely free hand, and it retains, accordingly, under the Act some degree of control over the fiscal policy and borrowing operations of the Provinces.

This control is the more necessary as no allocation of sources of revenue could be devised which did not leave the central Government with a deficit. Hence, in addition to the control referred to above, an annual contribution from the Provinces to the Central Government is provided for. This sum is not to be

increased, and it is desired that it should cease to be paid as early as practicable.

(c) A substantial instalment of responsible and representative government was at the same time conferred upon the Legislative Councils of the nine major Provinces (including Burma, to which the provisions of the Act were extended in 1922).

(i) The Councils were much enlarged and an elective majority of at least 70 per cent. of the total membership was provided for in each of them.

(ii) The franchise was granted to between six and seven million Indian and Burman subjects. Space does not permit an exposition of the basis of the franchise.

(iii) An Executive Council was set up in each of the nine "major" Provinces on the model of those previously in existence in the three Presidencies and in Bihar and Orissa.

(iv) The "provincial subjects," which, as already mentioned, were assigned to the jurisdiction of the Provincial Governments and Legislatures, were subdivided into two categories—"reserved" and "transferred." The administration of "reserved subjects" was made the charge of the Governor and his Executive Council. "Transferred subjects" were handed over to the Governor acting with Ministers, who are selected by him from the elected members of the Legislative Council and are responsible to that body. The Provincial Executive is now a dual organism: *quoad* "reserved" subjects, it consists of the Governor in (Executive) Council; *quoad* "transferred" subjects, it consists of the Governor acting with Ministers: the Governor thus forms the link of unity between the two parts. For the administration of reserved subjects the Governor in Council remains responsible in the last resort to the Secretary of State and the Imperial Parliament; for the administration of transferred subjects the Ministers are responsible to the Legislative Council of which they are members, though the Governor is not bound to act on their advice.

The Legislative Council has jurisdiction equally over all provincial subjects, both transferred and reserved. But in respect of the latter category it was necessary to provide the irremovable Executive (the Governor in Council) with power to counteract

in emergencies an adverse vote of the Legislature in which officials form a small minority, and to arm him with power to secure, in spite of such a vote, the legislation which he regards as essential for the discharge of his responsibilities.

This power is provided by section 72 (e) of the Act, which enables the Governor to certify a bill which relates to a reserved subject as being essential to the discharge of his responsibilities for the subject to which it relates, and thereupon to enact it on his own responsibility.

As regards legislation affecting “transferred subjects” a majority vote of the Council is conclusive. But since no Provincial Act has validity unless it is assented to by the Governor and the Governor-General, it is open to either of those authorities to disallow any Act after it has been passed. And similar power vests in the King in Council in respect of any Act which has been assented to by the Governor and the Governor-General.

Perhaps the most important extension of the powers of the Legislative Councils effected by the Act is in the sphere of finance. The estimates of the provincial expenditure and revenue for the year must (by section 72 (d)) be laid before the Council, together with the proposals of the local Government for the appropriation of the revenues in the form of demands for grant, with the exception of appropriation for certain specified services such as the provincial contribution to the central Exchequer, interest on loans and the pay of officials appointed by the Crown or the Secretary of State in Council, which are not subject to the Council’s vote. With these exceptions, however, all expenditure proposed by the Government, whether for reserved or transferred services, requires the provision of supply by vote of the Council on the appropriate “Demand,” and on presentation of a Demand the Council may assent, reject it, or reduce it in amount. Here also, however, it was necessary to provide the Governor in Council with power similar to that already described with respect to legislation to enable him to obtain the supply which he regards as essential for the discharge of his responsibilities for reserved subjects, notwithstanding an adverse vote: consequently the local Government has “power in relation to any demand, to act as if it had been assented to notwithstanding the withholding of such assent

or the reduction of the amount therein referred to if the demand relates to a reserved subject, and the Governor certifies that the expenditure provided for by the demand is essential to the discharge of his responsibility for the subject."

The transfer of control over certain subjects to Ministers responsible to the Provincial Legislative Council made it necessary to enable the Secretary of State and the Government of India to divest themselves, in respect of those subjects, of the unlimited powers of "superintendence, direction and control" which have already been noticed as the central feature of the old regime. Accordingly the Act gave a rule-making power with this object, and the rules framed have in fact limited the power of intervention in "transferred" administration to certain specified purposes, such as the safeguarding of Imperial interests and the administration of "central" subjects, and the settlement of inter-provincial differences. Over "reserved" provincial subjects and "central" subjects no change in law has been made in the supremacy of His Majesty's Government as represented by the Secretary of State, though the policy of the Act of 1919 necessarily assumes considerable increase in the influence over even those matters to be exercised by the Provincial and Indian Legislatures respectively.

B. In the Central Government of India.

The foregoing changes relate either to the relations between the central and local Governments or to the constitution and powers of the local Governments. The central Government is left by the Act unchanged save that (a) the Governor-General's Executive Council may now consist of more than six members (it consists at the present moment of seven, of whom three are Indians), and (b) the central Legislature, now called the "Indian Legislature," is reconstituted on enlarged and more representative lines: it now consists of the "Council of State" (the Upper Chamber), consisting of sixty members, of whom thirty-four are elected, and the "Legislative Assembly" (the Lower Chamber), consisting of 144 members, of whom 104 are elected. Officials have twenty-six seats in the Assembly: in the Council of State they cannot exceed twenty.

The powers and duties of the “Indian Legislature” differ little in character within the “central” sphere from those of the Provincial Councils in the provincial sphere. But as in the Indian Legislature there is no responsible Government, the Governor-General’s power to disregard an adverse vote in either Chamber is not limited, like those of provincial Governors, to certain specified subjects, but covers the whole field. The sphere of operations of both Chambers of the Indian Legislature is identical, except that the power to vote supply is confined to the Legislative Assembly. In respect of money bills the Chambers have equal powers.

It will be evident from the foregoing account—brief and incomplete as it necessarily is in many respects—that the present Indian Constitution contains many features which, judged by commonly accepted standards, are anomalous and unprecedented. This was fully recognised by its authors, who were, however, faced with the unprecedented task of devising a system which would provide at once an *instalment* of responsible government while maintaining some measure of the direct responsibility of the Imperial Parliament for the administration of Indian affairs which had been in theory complete and absolute since 1858 : and at the same time of fashioning the nature of the instalment in such a way as to enable it to be expanded by stages without structural alteration until a complete transfer of control from the British Parliament and electorate to Indian Councils responsible to an Indian electorate had been effected. To what extent the expedients adopted with this object will work “according to plan” time and practical experience alone can demonstrate.

III.

UNITED STATES CONSTITUTION.

As this Constitution forms part of the student’s curriculum, and as it is the parent of all federal constitutions, except, perhaps, the Swiss, a brief account of it is given here. The Constitution was issued in September, 1787, but it has been amended from time to time.

Its salient feature is the attempt, largely successful, to separate sharply the Legislature, the Judicature, and the Executive.

The Legislature is vested in Congress, consisting of two Houses, viz., the Senate and House of Representatives. 'Judicature is vested in the judicial bench, and the Executive in the President, who has to be guided in certain instances by the Senate.

The President holds office for four years, and is elected in the following manner : Each State of the Union elects a "college" of electors equal to the number of senators and representatives to which such State is entitled, and the man who gets the largest numbers of the votes of these electors is chosen President. (For further particulars see Dodd's *Modern Constitutions*, vol. 2, p. 301.) The person chosen must be at least thirty-five years of age and fourteen years resident in the United States. If the President dies during his term of office the Vice-President takes his place for the remainder of the term. The President is commander-in-chief of the army, navy, and militia. He can pardon crimes, impeachments excepted.

The President also can be impeached like other American statesmen, but impeachment can only involve loss of office. By and with the advice of the Senate the President can conclude treaties with foreign Powers, provided that two-thirds of the Senate concur, and the same assent is necessary for declaring war and making peace. As the Senate holds office for a longer period than the House of Representatives, the President occasionally has a hostile Upper House to deal with.

The Senate also has to be consulted about the nomination of public ministers, ambassadors, consuls, and the Supreme Court judges. The President can occasionally and temporarily fill up vacancies in the Senate. He may, on an occasion of great emergency, convene the Legislature and adjourn both Houses when they disagree.

He has, however, no voice in legislation, though he makes a speech at the beginning of the sitting, which may or may not receive attention.

He differs from the English Premier, or Cabinet, in that he

does not introduce a legislative programme which he is bound to carry out.

He recommends legislation in his inaugural speech, but has to enlist friends in the Legislature if he wishes to get a measure carried.

Congress must assemble once yearly at least. The Upper House, or Senate, consists of two members of each State, chosen by popular vote for six years, one-third retiring every two years. All senators must be over thirty years of age, citizens of the United States of at least nine years' standing, and residents in the States for which they are chosen. The Vice-President is *ex officio* President of the Senate. Each State, whether small or large, elects two senators. The members of the House of Representatives are distributed among the States in proportion to population, so that the more populous States outweigh the others. The House of Representatives was intended to represent the nation on the basis of population, whilst the Senate was to represent the States. The judicial bench can interpret the Constitution, and refuse to give effect to laws which contravene it. Again, the electoral college, who choose the President, vote to a man with their party and vote for the party candidate : to do otherwise being considered dishonourable (Dicey). Furthermore, the Senate lately ventilated the view "that the President could not exactly be a party man where the rights of the Senate were concerned."

Differences between the English and American Constitutions.

1. In America the President is in practice more of a ruler than the English King, but his legal powers are far more restricted.

2. The President can veto legislation, but by the adoption of somewhat complicated constitutional machinery such veto may be overcome; whilst the English King has, conventionally speaking, a very shadowy power of veto which has been dormant since the reign of Anne.

3. The English Constitution is flexible, the American rigid—i.e., in England all laws, constitutional or otherwise, can be altered with equal ease, whilst in America complicated machinery is necessary for the alteration of the Constitution.

4. The judges, as in all written Constitutions, can disregard an Act of the Legislature which is *ultra vires*.

5. The American Constitution is written, whilst the English Constitution is unwritten.

6. In the American Constitution Montesquieu's doctrine of the separation of powers is followed as closely as possible, whilst in England it is not.

7. Parliament in England is the legal sovereign, whilst in America, as in most federal States, sovereign powers are split up amongst a number of co-ordinate bodies.

8. In England the impeachment of Ministers is obsolete, whilst in America it is part of the written Constitution.

9. The English Crown is inherited under a statutory entail, whilst the American President is elected for a term.

10. In England the treaty-making power is legally vested in the Crown (*i.e.*, the Cabinet by convention), whilst in America it is vested in the President and the Senate.

11. Declaration of war and the making of peace rests with the Crown in England, whilst in America it is vested in the President and Senate.

12. The American President is not dependent on the vote of Congress, whilst in England the Cabinet is. In America, therefore, the Executive is not responsible to the Legislature.

England is the only country possessing hereditary legislators. Even Germany and Austria do not possess these, though Germany possessed many hereditary Sovereigns.

APPENDIX B.

THE TREATY-MAKING POWER OF THE CROWN.

Blackstone says : " It is the Sovereign's prerogative to make treaties, leagues and alliances with foreign States. It is essential to the goodness of a league that it should be made by the sovereign power, and this power is vested in the King. Whatever contracts he engages in, no other power in the kingdom can annul." Maitland contends that a treaty made by the Crown, though binding upon the Crown in public international law, has no legal effect upon the rights of the subject (Constitutional History, p. 424), and instances the Extradition Acts to show that the King is precluded from surrendering persons accused of crime contrary to our law without the aid of a statute. No treaty, except under very exceptional circumstances, should collide with the rights of the subject.

In the case of *The Parlement Belge* (1879), 4 P. D. 429, Sir R. Phillimore quotes Blackstone's *dictum*, and then says, " Blackstone must have known very well that there were a class of treaties the provisions of which were inoperative without the confirmation of the Legislature," and then says that a treaty affecting private rights requires the sanction of the Legislature (cf. Maitland, pp. 424-425). The Court of Appeal reversed his judgment upon a question of fact, and decided that question of fact in such a way as to make it unnecessary for them to pronounce upon the legal principle underlying Sir Robert Phillimore's judgment. They did not, however, question that principle.

By the making of a treaty the Crown may bind the Legislature by a moral obligation to carry it into effect. " Treaties of peace when made by the competent power are binding on the whole nation. If a treaty requires money to carry it into effect, and the money cannot be raised but by an Act of the Legislature, the

treaty is morally obligatory on the Legislature to pass the law, and to refuse it would be a breach of public faith" (Kent's Commentaries, 1873 ed., p. 166). See also *California Fig Syrup Co.* (1884), 40 C. D. 620, at p. 627.

In *Walker v. Baird*, [1892] A. C. 491, Lord Herschell said : "The learned Attorney-General . . . conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary to compel obedience to a treaty." The Attorney-General had argued that the Crown can compel its subjects to obey the provisions of a treaty putting an end to a war and that its power could be no less in the case of a treaty the object of which was to avert war. Lord Herschell decided the case on the footing that it had not been pleaded that the treaty in question was of this character, and declined to decide whether a treaty either of peace or for the avoidance of war differed from other treaties in being enforceable in the municipal courts without being enacted.

APPENDIX C.

CESSION OF TERRITORY.

Professor Maitland is of opinion that the King may cede territory, at all events, territory acquired during war, but he is uncertain as to the extent of the power. He also considers that the King cannot without a statute cede land subject to the British Parliament (Maitland, p. 424). He says that parliamentary sanction was obtained to the treaty of peace after the War of Independence. Florida was ceded to Spain without a statute, but by a treaty of peace. Lord Thurlow argued, in opposition to Lord Loughborough, that such cession was lawful. Similar cessions were those of Senegal, Minorca, and Banca.

In the following cases the Crown alienated British territory by a treaty which was neither a treaty of peace nor a treaty to avert war :—(1) Case of the surrender in 1817 to the Sikhim Puttee Rajah of territory formerly belonging to Nepaul. (2) In 1833 a surrender to Voorunder Singh of a portion of Assam, the Rajah undertaking to abstain from torturing his subjects. The Rajah was also under the treaty to pay a large annual tribute (Forsyth, *Cases and Opinions on Constitutional Law*, p. 185). Mr. Forsyth also says that since the Mutiny there have been several of these cessions to Indian rulers, but remarks that Indian necessities cannot be judged by European precedents (*ibid.*, p. 186).

In 1853 the Orange River territory was abandoned by Order in Council and proclamation; and in 1863 the Crown relinquished without Act of Parliament its protectorate over the Ionian Islands—a different thing, as Palmerston contended, from ceding territory of which the Crown was sovereign. In 1890 the treaty ceding Heligoland was expressly made inoperative until confirmation by Parliament.

APPENDIX D.

THE EMERGENCY POWERS ACT, 1920 (c. 55).

This statute provides that, if at any time it appears to his Majesty that action has been taken, or is threatened, to interfere on an extensive scale with the supply of food, fuel, light, or other necessities of life or with the means of locomotion, whereby the public or a large section thereof would be seriously affected, his Majesty may, by proclamation, declare a state of emergency. No such proclamation shall be in force for more than a month, without prejudice to the issue of a fresh proclamation during that period. Where proclamation of emergency has been made Parliament is to be informed thereof forthwith, and if the Houses be then adjourned or prorogued, they shall be summoned to meet within five days.

Where proclamation of emergency has been made, and so long as it shall be in force, his Majesty may in Council by order make regulations for securing the essentials of life to the community, and those regulations may impose on a Secretary of State or other Government Department, or any other person in his Majesty's service or acting on his Majesty's behalf, such powers and duties as his Majesty may deem necessary for preserving the peace, securing to the public the necessities of life, the means of locomotion, and the general safety. Nothing in the Act is to authorise the making of regulations imposing any form of compulsory military service, the alteration of the rules of criminal procedure, or punishment for the peaceable persuasion of persons to join in a strike.

All regulations made by his Majesty shall be laid before Parliament as soon as practicable, and shall not continue in force after the expiration of seven days from the time they were laid before Parliament, unless a resolution is passed by both Houses providing for the continuance thereof. The regulations may

provide for the trial by courts of summary jurisdiction of persons offending against the same, and the maximum penalty for breach of the regulations shall be imprisonment with or without hard labour for three months, or a fine of £100, or both such imprisonment and fine together with the forfeiture of any goods or money in respect of which the offence has been committed.

The regulations so made may be added to, altered, or revoked by resolution of both Houses, but the expiry or revocation of such regulations is not to affect any action taken thereunder.

This Act, as well as the Church of England Assembly (Powers) Act, sanctions important legislation by resolution of both Houses. As regards the Church Act, the legislation only affects a section of the community, but as regards the Emergency Powers Act, criminal offences can be created in the first instance by a royal proclamation, and afterwards made permanent by resolutions in both Houses.

The Act is, perhaps, justified by necessity, but the precedent of altering the criminal law in any other way than legislation by bill, with its usual publicity, is hardly to be commended.

APPENDIX E.

CHARTERS AND OTHER CONSTITUTIONAL DOCUMENTS.

MAGNA CHARTA.

1. The Church is to be free and to have her liberties inviolable.
2. The heir, if of full age, is to pay the customary relief only—*i.e.*, for baron or earl, £100; for knight, 100s.
3. The heir of Earl or Baron, if under age, to be in wardship. When he comes of age to have his inheritance without relief and fine.
4. Guardians (*i.e.*, lords of fees) are to take reasonable and customary profits from the ward, and the inheritance is not to be wasted, neither is there to be destruction of property.
5. Heirs are to be married without disparagement (*i.e.*, they must marry a man or woman of similar rank).
6. The Sovereign shall not authorise mesne lords to exact other than the three customary aids : (1) to ransom the lord's person; (2) to contribute to knighting his eldest son; (3) to portion once his eldest daughter. Aids must be reasonable.
7. The King shall not hold the lands of convicted felons for more than a year and a day, after which the said lands are to be handed over to the mesne lord.
8. Common Pleas shall not follow the King's Court but shall be held in some fixed place.
9. The Assizes of Novel Disseisin, Mort d'Ancestor, and Darrein Presentment shall only be held in the court of the county where the lands are situate. The King, or in his absence the Justiciar (a), shall send into each county two justices four times each year, who, with four knights to be chosen by the county court, shall hold such assizes. . . .

(a) When the King is absent for any length of time from the country it is now the custom to appoint dignitaries styled Lords Justices to do certain formal acts on his behalf.

10. A freeman shall only be amerced, for a small offence after the manner of the offence, for a great crime according to the heinousness of it, saving to him his contenement (b).

11. No sheriff, constable, coroner, or bailiff is to hold Pleas of the Crown (c).

12. The Writ of Inquest of life and limb shall be given gratis and not denied (d).

13. In future anyone may leave the kingdom and return at will, unless in time of war, when he may be restrained for some short space for the common good of the kingdom. Prisoners, outlaws, and alien enemies are excepted from the benefit of this clause.

14. Justices, constables, sheriffs, and bailiffs shall only be chosen from those who know the law and mean duly to observe it.

15. No scutage or aid shall be imposed, except the three accustomed aids before mentioned. . . .

16. In order to take the common counsel of the realm in the imposition of aids other than the accustomed aids, the King shall cause to be summoned the archbishops, bishops, earls, and greater barons by separate writs addressed to each, and all others by a general writ addressed to the sheriff of each county. A certain day and place is to be fixed for the meeting, of which forty days' notice shall be given, and the cause of summoning the assembly is to be specified and the consent of those present is to bind those not present.

17. "No freeman shall be taken or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers or the law of the land (e). To none will we sell, to none will we deny, or delay right or justice."

(b) This bears a distant resemblance to the *beneficium competentiae* familiar to students of Roman law.

(c) As to the meaning of the term "Pleas of Crown" see Langmead, 7th ed., p. 921. The term signified, according to the most correct view, "criminal offences."

(d) The object of this clause was to provide a remedy against long imprisonment without the old equivalent of a trial.

(e) The word "peer" is a subject of academic controversy. Coke considers it equivalent to "the verdict of a man's equals." In matters criminal the word " pares," so far as the greater barons were concerned, meant the

CONFIRMATIO CHARTARUM.

The early portion of this enactment confirms the Great Charter of Liberties subscribed to by Henry III. and the Charter of the Forest. Later on the Act provides to the following effect :—

“Whereas divers of our people fear that the aids and tasks which they have given us towards our wars of their own good will might become a (perpetual) burden to them and their heirs, and so in like manner ‘prises’ taken throughout the realm by us, we therefore undertake (literally ‘grant’) that we will not levy such tasks, aids, or prises but by the common consent and for the common profit, save the ancient aids and prises of right accustomed. And whereas the greater part of the commonalty being aggrieved by the maltote of wool have petitioned us to remit the same and we do remit the same and undertake for ourselves and our heirs that we will not take such thing nor any other thing without the common consent and goodwill, saving, nevertheless, to us and heirs the custom of wool skins and leather granted before by the commonalty aforesaid.”

PETITION OF RIGHT.

The Petition contained the following clauses :—

I. That it was provided by a statute of Edward I. called *De Tallagio non concedendo* (f) that no tallage (g) or aid be levied by the King or his heirs without the assent of the Lords Spiritual and Temporal and the commonalty, and that it was enacted in the twenty-fifth year of the reign of Edward I. that no man be compelled to make loans to the King against his will, and by other laws of this realm it is provided (1 Rich. III. c. 2) that none be charged by any imposition called a benevolence. . . .

II. Nevertheless, commissions by means whereof your people have been in divers places assembled and required to lend money unto your Majesty and on refusal have been constrained to attend before the Privy Council, and in other places, and others

right of every peer to be tried by his fellow-peers for treason or felony. As to civil matters and misdemeanours, all freeholders were a man's equals whether baron or no baron (see Langmead, 7th ed., pp. 105, 106).

(f) The authenticity of this enactment is doubted.

(g) Arbitrary levy on the royal demesne lands (Langmead, ch. 5).

of them have been imprisoned, molested and disquieted, and divers other charges have been levied upon your people by Lords-Lieutenant, Deputy Lieutenants, . . . justices of the peace and others.* . . .

III. By the Great Charter of Liberties it is enacted that no freeman be imprisoned, disseised of his freehold or liberties or his free customs or be outlawed or exiled, &c., but by the lawful judgment of his peers, &c. (9 Hen. III. c. 29).

IV. By 28 Edw. III. c. 3 it was enacted that no man should be put out of his lands or tenements nor taken or imprisoned nor disinherited nor put to death without being brought to answer by due process of law.

V. Nevertheless, contrary to such statutes and laws, divers of your subjects have been imprisoned without cause shewed and on being brought before your justices by your Majesty's writs of *habeas corpus*, there to undergo and receive as the court should order, and their keepers commaunded to certify the causes of detainer, no cause was certified but that they were detained by your Majesty's special command.

VI. And whereas of late great companies of souldiers and mariners have been dispersed into divers counties, and the inhabitants have been compelled to receive them into their houses against the laws and customs of this realm.

VII. And whereas it was enacted by 25 Edw. III. c. 3 that none be forejudged of life or limbe contrary to the Great Charter and the law and by the said charter and other laws of this realm no man ought to be adjudged to death save by means of the law, yet nevertheless lately divers commissions under the Great Seal have issued forth, appointing commissioners to proceed within the realm according to the justice of martial law against such souldiers and marriners or other dissolute persons joining with them as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, and by such summary course and order as is agreeable to martial law and as is used in armies in tyme of war to proceed to the trial and condemnation of such offenders and them to cause to be executed and put to death according to the law martiall. By pretext whereof some of your Majesty's subjects have been put to death . . . (con-

trary to the laws). And also sundry grievous offenders by colour thereof claiming an exemption have escaped legal punishment by reason that divers officers and ministers of justice have unjustly refused to proceed against such offenders upon the pretence that such offenders were only punishable by martial law and by authority of such commissions as aforesaid, which commissions and all others of the like nature are wholly contrary to the laws of this realm.

The King assented to this petition of the Lords and Commons.

BILL OF RIGHTS.

I. After reciting the various abuses prevalent *temp.* James II., and that James II. having abdicated the Government, the throne was thereby vacant, proceeded to ordain—

(1) That the pretended power of laws or the execution of laws by regall authority without consent of Parliament was illegal.

(2) That the pretended power of dispensing with laws, or the execution of laws by regall authority as it hath been assumed and exercised of late, without consent of Parliament is illegal.

(3) That the commission for erecting the late Court of Commissioners for ecclesiastical causes and all other commissions of the like nature are illegal and pernicious.

(4) That the levying of money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal.

(5) That the right of the subject to petition the King and all commitments and prosecutions for such petitioning are illegal.

(6) That the raising or keeping a standing army within the kingdom in time of peace unless it be with consent of Parliament is against law (*h*).

(7) That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.

(8) That elections of members of Parlyament ought to be free.

(9) That freedom of speech and debates or proceedings in Par-

(*h*) Hence the Mutiny Acts and the annual Army Act.

lyament ought not to be impeached or questioned in any court or place out of Parlyament.

(10) That excessive bail ought not to be required nor excessive fines imposed nor cruell or unusuall punishment inflicted.

(11) That jurors ought to be duly impanelled and returned and that jurors which passe upon men in trialls for high treason ought to be freeholders.

(12) That all grants and promises of fines and forfeitures of particular persons before conviction are illegall and void.

(13) And that for redress of all grievances and for the amending, strengthening, and preserving of the lawes, Parlyament ought to be held frequently.

II. The Crown was bestowed as follows : William III. and Mary were to be King and Queen during their joint lives, and that during that period the regal power was to be exercised by William III., and after the death of the survivor the Crown was to go to the heirs of the body of Mary, and in default of such heirs to Anne of Denmark and the heirs of her body, and in default of such heirs to the heirs of the body of William III. An oath of allegiance, much in the same form as at present, was prescribeu by the Act and also the oath of supremacy : “I, A B, do swear that I do from my heart abhor that damnable doctrine that princes excommunicated or deprived by the Pope may be deposed or murdered by their subjects or any other whatsoever. And I do declare that no foreign prince, person, &c., &c., hath any jurisdiction, &c., &c., within this realm.” By section 9 of the Act persons professing the Popish religion or marrying a papist are to be excluded from the throne, and subjects are absolved from their allegiance.

For the rest of the Act see Langmead, p. 528, and also his note as to dispensing power on section 12, which is important.

The Bill of Rights was confirmed the following session, and became a statute of the kingdom.

THE ACT OF SETTLEMENT.

By this Act the Crown was settled as follows, namely, on Sophia, Electress and Duchess Dowager of Hanover, daughter of Elizabeth, late Queen of Bohemia, who was the daughter of James I. It was further provided—

(1) That whosoever shall hereafter come to the possession of this Crown shall joyn in communion with the Church of England as by law established.

(2) That in case the Crown and Imperiall Dignity of this realm shall hereafter come to any person not being a native of this kingdom of England this nation be not obliged to joyn in any warre for the defence of any dominions or territories which do not belong to the Crown of England without the consent of Parliament.

(3) That no person who shall hereafter come to the possession of this Crown shall go out of England, Scotland or Ireland without consent of Parliament (repealed by 1 Geo. I., st. 2, c. 51).

(4) That from and after this time the further limitation by this Act shall take effect all matters and things relating to the well-governing of this kingdom which are properly cognisable in the Privy Council by the laws and customs of this realm shall be transacted there, and all resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same (repealed by 4 Anne, c. 8, s. 24; revived by 4 & 5 Anne, c. 20, s. 27).

(5) That after the said limitation shall take effect as aforesaid no person born out of the kingdoms of England, Scotland or Ireland or the Dominions thereunto belonging (although he be naturalized or made a denizen, except such as are born of English parents) shall be capable to be of the Privy Council or a member of either House of Parliament, or to enjoy any office or place of trust either civil or military, or to have any grant of lands, tenements, or hereditaments from the Crown to himself or to any other or others in trust for him (repealed by the combined effect of various Naturalization Acts).

(6) That no person who has an office or place of profit under the King or receives a pension from the Crown shall be capable of serving as a member of the House of Commons.

(7) That after the said limitations shall take effect as aforesaid judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established, but upon the address of both Houses of Parliament it shall be lawful to remove them.

(8) That no pardon under the Great Seal shall be pleadable to an impeachment by the Commons in Parliament.

PRINCIPAL ARTICLES OF ACT OF UNION OF ENGLAND
AND SCOTLAND.

(1) That the two kingdoms of England and Scotland shall upon the 1st day of May, 1707, be for ever united into one kingdom by the name of Great Britain.

(2) That the succession to the monarchy of the United Kingdom of Great Britain after the death of Queen Anne without issue pass to Princess Sophia of Hanover and the heirs of her body, being Protestants. And that all papists and persons marrying papists shall be excluded from the throne of Great Britain and the Dominions thereunto belonging. And that in the event of the heir to the throne being or marrying a papist the same pass to the next Protestant heir.

(3) That the United Kingdom of Great Britain be represented by one and the same Parliament, to be styled the Parliament of Great Britain.

(4) That subjects of the said United Kingdom shall have equal rights of trade and navigation.

(6) That the customs duties be identical in both countries.

(7) That the laws as to excise be the same in both countries.

(9) Provisions as to land tax.

(16) That there be one coinage for both countries.

(17) Weights and measures are to be uniform (repealed by 41 & 42 Vict. c. 49).

(18) That laws concerning regulation of trade, customs and excise, and all laws made in Scotland concerning public rights (except such as are contrary to or inconsistent with this Act) shall remain in force unless altered by Parliament, but that no alteration in laws which concern private rights be altered by Parliament except for the utility of subjects within Scotland.

(19) This Article provides for the continuance of the Scotch courts of justice.

(22) That sixteen peers of Scotland may sit and vote in the House of Lords.

(23) That the said sixteen peers of Scotland shall have all privileges of Parliament enjoyed by English peers, including the right to try peers for treason or felony, and that all non-representative peers of Scotland or otherwise and their successors

shall, as regards precedence, rank next to the peers of England of the same grade, and enjoy all privileges of peerage except the right of sitting in the Lords and voting and sitting upon the trial of a peer.

(25) That all laws and statutes contrary to the Articles are to be void (i).

All the Articles are in section I. of the Act.

Section II. provides for the maintenance intact of the Protestant religion in Scotland and also Presbyterian Church government. It also provides for the continuance of the four universities of Scotland, namely, St. Andrews, Glasgow, Aberdeen, and Edinburgh, and that the professors and other university officials do make a confession of faith.

Section III. provides (*inter alia*) that the Sovereign at his coronation swear to preserve the Church of England.

Section VI. provides that Scotland is to be represented in the Commons of the Imperial Parliament by forty-five commoners (k), and contains particulars as to their election.

Section VII. declares the Act valid and practically embodies it in the Articles.

Section VII. recites two Acts relating to church worship in England, namely, the Act of Uniformity passed in the reign of Elizabeth (13 Eliz. c. 12) and the Act of Uniformity passed in the reign of Charles II. (13 & 14 Car. II. c. 4), and ratifies the same (l).

PRINCIPAL ARTICLES OF ACT OF UNION WITH IRELAND.

(1) That from and after January 1, 1801, Great Britain and Ireland be united into one kingdom by the name of the United Kingdom of Great Britain and Ireland.

(2) That the succession to the Crown stand limited as it stands at present.

(3) That there be one Parliament for Great Britain and Ireland.

(i) Parliament is, however, now absolutely sovereign.

(k) Altered.

(l) These Acts have been altered by the University Test Act, 1871, and also by an Act altering the lessons to be read in English churches.

(4) That there be four Irish Lords Spiritual and twenty-eight Lords Temporal elected for life to sit and vote in the House of the Lords of Parliament of the United Kingdom. One hundred commoners, including two for the city of Dublin, two for the city of Cork, one for Trinity College, Dublin, and one for each of the thirty-one most considerable cities and boroughs were to sit and vote in the House of Commons of the United Kingdom (*m*). That any existing Irish Act regulating the election of Irish lords and commoners shall be deemed to be embodied in the Act of Union. That all questions concerning the rotation and election of lords of Ireland be decided by the lords of the United Parliament. That non-representative peers may be elected to membership of the House of Commons, but shall not be entitled to any privilege of peerage whilst serving as members of the Commons of the said House. His Majesty is to have a restricted right to create peers of Ireland (see *ante*, p. 277). Irish peers are to rank next after peers of the same grade in Great Britain at the time of the Union.

(5) That the Churches of England and Ireland are to be united into one Protestant Episcopal Church and the doctrine of the Church of Scotland is to remain intact.

(6) That the subjects of Great Britain and Ireland were to have equal privileges as to trade, navigation, and treaties with foreign States.

(7) As to duties on exports and imports from either country and other financial matters.

(8) All laws in force at the time of the Union and all courts of jurisdiction to remain till altered by the United Parliament. All Irish appeals to be heard in the House of Lords, and Admiralty appeals were to be decided by the Court of Delegates (*n*).

Section 2 of the Act recites and ratifies an Irish Act respecting the mode of election of Irish peers (*o*) and commoners.

(*m*) This clause has been repealed as to the Lords Spiritual and the Commons by various enactments.

(*n*) The Judicial Committee of the Privy Council was afterwards substituted for the Court of Delegates.

(*o*) See *ante*, p. 280.

APPENDIX F.

THE CRIMINAL AND CIVIL JURY.

The criminal jury is supposed by some to have originated from Ethelred's jury of presentment, but about this institution little that is reliable is known. Stubbs traces the jury to the Carolingian capitularies. In the reign of Henry II. a similar kind of jury is provided by the Constitutions of Clarendon. In 1166 the Assize of Clarendon ordained that twelve lawful men from each hundred and four lawful men from each township should be sworn to accuse reputed robbers, murderers, thieves, and receivers, and harbourers of murderers or thieves, and that the persons so presented be sent to the ordeal of water. By the Articles of Visitation (*temp.* Richard I.) the constitution of the grand jury established by Henry II. was further regulated and assimilated to the system then already in use for choosing the recognitors of the grand assize. The grand jury of those days were not judges of fact. They were neighbours who knew something of the transaction, either personally or from others they trusted. They had, however, to conceal nothing about which they had heard, and the rolls of the coroner and sheriff served as a check on them in this respect. At times the judges told the grand jury to institute enquiries in order to find out whether a given accusation was genuine. Till about 1215 reputed bad characters were sent to the ordeal, but even before that date we hear of another jury, the forerunners of the present petty jury, being impanelled to give the accused a further opportunity for acquittal. All these persons were witnesses rather than judges of fact like the jury of modern days. In the reign of Edward III. we hear of witnesses giving evidence who had no part in the verdict, but such evidence was given out of court.

In the reign of Henry IV. witnesses, who were clearly not

jurymen, gave evidence at the bar of the court, and in Fortescue's time juries were judges of fact, as at the present day.

In 1676 Penn and Mead were indicted under the Conventicle Act, and the jury at the trial, of whom Bushell was one, acquitted the prisoners. Bushell and his colleagues on the jury were fined and imprisoned for disregarding the ruling of the judge. On the application for a *habeas corpus* Vaughan, C.J., decided to the effect that a jury cannot lawfully be punished by fine, imprisonment, or otherwise for finding against the evidence or direction of the judge (*Bushell's Case*, Broom, Constitutional Law, p. 145). As to Fox's Libel Act, see *supra*.

By the Aliens Act, 1914—1918, any person interested may object in any proceeding, civil or criminal, to a foreigner being on the jury.

Foreigners are liable to serve on any jury after ten years' residence in England, if otherwise qualified. Women, if otherwise qualified, are also liable to serve.

The jury were originally summoned from the hundred, and as long as this practice prevailed they generally knew something about the case, but after a time they were selected from the body of the county. It is a strange fact that a man was not obliged, when charged with a criminal offence, to throw himself on his country for deliverance, and when the crime of which he was accused involved forfeiture he did not forfeit his property unless he pleaded. To make him plead he was crushed by heavy weights till he either pleaded or died (*peine forte et dure*). Strangeways was executed in this fashion in 1658, but the practice was not abolished till the latter half of the eighteenth century. When a man was appealed of felony he could challenge appellant to battle. Trial by battle was abolished in 1820 after *Thornton's Case*.

The Civil Jury.—In mediæval days there was no weighing or sifting of evidence. There was no trial, but a mode of proof was put forward. The demandant had to satisfy the court that his cause of complaint was genuine before defendant had to do anything (cf. Carter, English Legal Institutions, p. 222).

Cases were proved by compurgation, by an attested written document, or else by battle, or perhaps ordeal. Disputes respect-

ing freeholds were settled by battle. The plaintiff or demandant was unable to fight, but defendant could.

After the introduction of Henry II.'s grand assize, trial by battle, so far as civil cases, at any rate, were concerned, began to decline, for though, according to Glanville, defendant could choose between the assize and battle, the judges probably frightened him into choosing the assize for the settlement of the dispute.

At first the original writ commencing the action summoned a jury, or assize as it was then called, but after the introduction of pleadings the jury were summoned after joinder of issue by writ of *venire facias*, and this jury so summoned was known as the *jurata*. Hence the expression, *Assiza vertitur in juratam*.

The notion of adducing evidence unknown to the jury arose from the judge directing them to investigate facts before delivering a verdict. We see traces of this kind of direction in the functions of the present jury, who hear witnesses *in camera* before finding a true bill or otherwise. In Henry IV.'s reign witnesses gave evidence before the judge and jury, and the custom of taking the jury from the body of the county instead of the hundred contributed to converting the jury into judges of fact. As to challenges of jury and the rest of the law relating to them, the student is referred to the commentaries of Dr. Odgers on the common law.

It now appears to be the law that in a civil suit, as regards the King's Bench Division, that the Court has a discretion to disallow a jury in all cases except the following: libel, slander, malicious prosecution, false imprisonment, seduction, and breach of promise of marriage (*Ford v. Blurton* and *Ford v. Sauber* (1922), 38 T. L. R. 801), and a fresh difficulty has arisen owing to the County Courts Act, 1919, providing that the above actions may be commenced in a county court, but matters will be remedied by the proposed Administration of Justice Act, 1925, as the bill contains a clause giving either party the right to demand a jury in any of the above cases.

INDEX.

	PAGE		PAGE
ABERGAVENNY Peerage	277	Ambassadors	130
Absence of Members from Commons, leave of	325	American Constitution	361
Absent voters	340	Ancient appeals	57, 233
<i>Accedas ad curiam</i> , writ of, 226, n.		Annates	139
Accession declaration	110	Anne	130
Accounts, audit of Public	320	Annual Army Act	169
Acquisition of colonies	199	Mutiny Acts	169
Act of Indemnity	10, 85	taxation	317 <i>et seq.</i>
Act of Settlement	375	Appeals, civil	233, 235
Acts of Union	377	criminal	57
Adjournments of either House of Parliament	260	Appellate Jurisdiction Act, 280, 281	
of both Houses	260	Appropriation Act	320
Adjutant-General	188	Archbishops	156, 157
Administrative law	8	Archdeacon	159
Administrative prerogatives	122	Arches Court	162
Admiralty jurisdiction	231	Army	164 <i>et seq.</i>
Court	231 <i>et seq.</i>	Council	188
Adoptive Acts	207	Array, Commissions of	169
Adultery, when criminal	161	Arrest	49
Advocates, privilege of free- dom of speech of	62	Assault	49
Ahrens, Professor: Definition of Constitution	3	Assent by King to Bills	261
Aids, feudal	137	Money Bills	261
Aliens	39 <i>et seq.</i>	Assize, meaning of word ...	304, n.
cannot act as skipper ...	43	Attainder, Bills of	256
causing industrial unrest	43	Attorney-General	195
deportation of	42	of Queen	111
enemies	44	Audit of accounts	326
ex-enemies	45	Auditor-General, Controller and	326
guilty of sedition	43		
undesirable	40	BACON, impeachment of	256
when they can serve on juries	43	Bahamas	201
		Bail	48
		Ballot Act	343

PAGE	PAGE
Bancroft's quarrel with Coke 16, n.	Budget resolutions 22, 23
Baron, meaning of word 269	Business premises 338
Baronia, meaning of word ... 269	By-laws 29
Barony by patent 272	
by tenure 271, 272	
by writ 272	
Basutoland 201	CABINET 172 <i>et seq.</i>
Battery, when legal 59	and King 178
Battle, trial by 381	and Premier 177
Bechuanaland 201	Canada, Constitution of 211
Bengal, <i>see</i> "Indian Con- stitution."	<i>et seq.</i>
Bermuda 201	Canon law 154, n.
Bill of Exceptions 235	Canons, or Church laws 154
of Middlesex 227	(dignitaries of Church) 159
of Rights 374	<i>Capias</i> , writ of 153
Bills as to Duchy of Cornwall and prerogatives 301	Catholic Emancipation Act 330
Hybrid 227, 306	<i>Causa</i> , writ of <i>habeas corpus</i> <i>cum</i> 51
Money 301	Censorship of plays 65
Private 311 <i>et seq.</i>	Central Criminal Court .. 243, 244
Public 307	Central subjects, <i>see</i> "Indian Constitution."
Bishops, functions of, &c. ... 151	Certificate of Home Secretary as to naturalization ... 99 <i>et seq.</i>
House of 156	of Speaker as to Money Bills 288
Black Rod, Gentleman Usher of 266	<i>Certiorari</i> , writ of 256, n.
Blackstone 21, 365	Chairman of Committees ... 266
Blasphemy 65	of Ways and Means 268
Board of Agriculture and Fisheries 193	Chancellor, Lord High ... 195—228
of Trade 194	of Bishops 161
Bombay, <i>see</i> "Indian Con- stitution."	of Exchequer 190
Borough Sessions 243	of Duchy of Lancaster ... 238
Bracton, life of 114, n.	Chancery, Court of 228
Breach of promise of mar- riage, actions for, right to jury 382	Division 230
British nationality 97	Change of name by alien 43
possession, meaning of term 197	Channel Islands 197
settlements, meaning of term 197	Chapter of Cathedral 159
subjects, who are? 96	Charters 370 <i>et seq.</i>
Budget 320	Chester, Palatine Court of 234, n.
	Church of England, King's relations with 154
	Circuits 245
	Civil List 141

	PAGE		PAGE
Civil Service	191	Commons, Canadian House	
Clergy, House of	156	of	212, 213
privileges and liabilities		English House of ...	226 <i>et seq.</i>
of the	160	Communications, privileged	61
Clerk of Crown in Chancery	262	Royal	325
of Parliament	267	Compassing King's death ...	88, 91
(Under-Clerk) of Com-		King's deposition	90
mons in Parliament ...	267	Comptroller- and Auditor-	
of the Peace	246	General	320
Closure	293	Compurgation in wager of	
Coke, life of	16	law	227, n.
Colonial governor	203 <i>et seq.</i>	<i>Congé d'elire</i>	158
judge	216	Congress of U.S.A.	362
Office	196	Conscientious objectors	339
Colonies, acquisition of	199	Conservatism, tendency of	
ceded	201	federalism to	7
classification of	201	<i>Consimili casu</i> , Statute in ...	227
conquered	200	Consistory Court	161
mandatory	199	Constituent Assembly	212
settled	199	Constitution, Definition of,	
with responsible Govern-		2 <i>et seq.</i>	
ment	201	Constitutional Law, its	
Commercial List	234	nature and field	7, 8, 9
Commissioner of Metropolitan		Consuls	131
Police not to be in		Conventions of Constitution	
Commons	333	9 <i>et seq.</i>	
Committal for contempt	298,	Convicted felons ...	331
299, 301, 303		Convocation	155, 156
Committee for Ecclesiastical		Coronation oath	109
Legislation	156	Coroner	247
Joint	327	Corrupt practices	333, 334
Police and Sanitary	320	Council, tendency of every	
of Privileges	327	council to increase in size	172
of Public Accounts	320	of Defence	182
Railway and Canal Bills	320	County Court (ancient)	225
Scotch	310	modern	238
of Selection	326	County Court Judge	331
Standing	310	his inability to sit in	
of Supply	320	Commons	166
of Ways and Means	320	Court of Admiralty ...	231 <i>et seq.</i>
of Whole House <i>re</i>		of Appeal, civil	235
Money Bills	308, 309	Central Criminal ...	243
Committees, Select, for		of Chancery ...	228
Private Bills	312	of Common Pleas ...	226
Common Pleas, Court of	226	of Delegates	231
		Divisional	236

	PAGE		PAGE
Court— <i>continued</i> .		<i>Custos Rotulorum</i>	246
of Divorce	233	Cyprus	201
of Exchequer	227 <i>et seq.</i>		
of Exchequer Chamber ...	233	DAIL Eirean	349
of Forest	226	Damaree and Purchas, case	
High, of Justice ...	234 <i>et seq.</i>	of	89
High, of Parliament, <i>see</i>		Danby, impeachment of ...	125, n.
"Chapter 26."		<i>Darrein Presentment</i>	305, n.
Hundred	225	Davitt, case of Michael	300
of Judges of the Bench	226	<i>De contumace capiendo</i> , writ	
of King's Bench	227	of	160
of King's Court	225	<i>De donis conditionalibus</i> ,	
Leet	240, n.	statute of	229
of Manor	226	<i>De homine replegiando</i> , writ	
Palatine	234, n.	of	50
of Pie Poudre	235, n.	<i>De odio et atid</i> , writ of	50
of Probate	232 <i>et seq.</i>	<i>De tallagio non concedendo</i>	
of Referees	312	315, 372
of the Sheriff's Tourn ...	246	Dean and Chapter	158, 159
Stannaries (Court for		of Arches	162
tinnars and miners		of Cathedral	158, 159
of Cornwall) (now		Rural	159
abolished)	292	Death, sentence of, appeal	
of the Staple	235, n.	against	58
of Star Chamber	25, n.	Debate, rules of	326
of Wards and Livories, 138, n.		Debt, action of ...	227, n.
Courts-martial	165, 166	Declaration of alienage ...	100, 102
district	165	of King on accession	110
field	166	Decline of Private Bills	313
general	165	Defamation,	61
naval	167	Defence, Council of	182
Courts of Justice, erection of,		Delegates, Court of	231
by King	124	Denial of Christian truths ...	66
Cranworth, Lord, views of as		Denizen	101
to construction of statutes	22	Deportation of aliens	42
Crown, conditions of holding		Deposits by promoters of	
demise of	260	Private Bills	311
dispensing power of	17	Desertion from Army	82
prerogative of	114—144	Detention of aliens	43 <i>et seq.</i>
suspending power of	17	in non-criminal cases ...	59
title to	107, <i>et seq.</i>	Detinue, action of	227, n.
Curates	157	<i>Dialogus de Scaccario</i>	123, n.
<i>Curia Regis</i>	225	Direct and indirect taxation	314
Customary Court	225—226, n.	Director of Criminal Prose-	
Customs	142—143	cutions	314

	PAGE		PAGE
Disestablishment of Irish Church	13	Enlistment	168
Disobedience to orders, military and naval	84	Error, writ of	235
Dispensation as opposed to pardon	125, n.	Estate duty	143
Dispensing power	17	Estates in fee-simple	137, n.
Disqualifications for membership of Commons	331, 332	Estates tail	229, n.
Dissolution of Parliament	259, 260	Estrays	140
District court-martial	165	Examiners of Private Bills	311
Divisional Court	236	Exceptions, Bill of	238
Divorce Court	232, 233, 234	Exchequer Chamber, Court of	233
<i>Droit administratif</i>	31 <i>et seq.</i>	Exchequer of account	190
Drunkenness in Army	82	of receipt	190
of clergymen	162	Exchequer, Court of	228
Duchy of Cornwall	112	Excise	143
Duke	278	Exclusion of strangers (Parliament)	300
Dwelling house	337, 338	Expulsion of aliens	42
		Expulsion from Parliament	41, 42
EALDOR (Elder) of Hundred Court	225	Expulsion from Privy Council	181
Ealdorman, <i>see</i> "Earl."		Extraditable offences	41
Earl	225—279	Extradition	103
Ecclesiastical appeals	162, 231		
Edward I.	108	FAIRS and markets, prerogative as to	127
Edward II.	108	Fair reports	64
Edward III.	108	Falkland Islands	201
Edward IV.	108	False imprisonment	47
Edward VI.	108	remedies for	48
Efflux of time, termination of Parliament	259	right to jury in	382
Election petitions	343	Faalty, oath of	138
Elections	320 <i>et seq.</i>	Federalism	6, 7
Elections disputed	342	Federation, requirements for successful	6
Electorate are political sovereigns	12	Fee-simple estate	137
Elizabeth	15, 25, 108, 292	Fee-tail estate	229
Ellenborough, judgment in <i>Burdett v. Abbott</i>	301	Fees of House of Commons	302
Ellesmere	16, n.	Felon cannot be Member of Parliament	331
Elliot, Sir John	292	<i>Fieri facias</i> , writ of	249
English Constitution, characteristics of	10, 11	Fiji	201
		Finance	314 <i>et seq.</i>
		Finance Act	321

	PAGE		PAGE
Finance Member, Army Council	189	Gentleman Usher of the Black Rod	262
Financial Secretary	191	George I.	109, 176
Finch, his definition of prerogative	114	George II.	176
First decision against barony by tenure	273, 277	George III.	292
First Military Member, Army Council	189	Glanville, account of	226, n.
FitzHarris, impeachment of	256	Gibraltar	201
FitzHerbert, account of	19	Gold Coast	201
FitzWalter Peerage	274	Governor of colony	203
Flexible Constitutions	3, 4, 5	Governor-General, <i>see</i> "Constitutions of Australia, Canada, India, and South Africa."	
Floyd, case of	253	Governors of Indian Dependencies, <i>see</i> App. A.	
Force, use of	59	Grades of peers	277, 278, 279
Foreign Enlistment Act	105	Grand jury	App. F
Foreign jurisdiction of Crown	104	Grand serjeanty	138
Foreign parentage, persons of, <i>see</i> "Declaration of alienage."		Grenada	201
Foreign prerogatives	128	Guernsey	180
Foreign States, crimes committed by Englishmen in	104, 104, n.	Guiana (British)	201
Formal messages of King to Parliament	122, 325	HABEAS CORPUS	
Fountain of honour, King as	127	<i>cum causâ</i> , writ of	51
of justice, King as	122—127	<i>ad recipiendum</i>	51
Franchise, British	334 <i>et seq.</i>	<i>ad respondendum</i> , writ of	51
Frauds, Statute of	318	<i>ad satisfaciendum</i>	51
Freedom from arrest ...	296 <i>et seq.</i>	<i>ad subjiendum</i>	51
of association	68, 69, 70	Habeas Corpus Act, 1679	52
of discussion	61 <i>et seq.</i>	duty of judge as to	52, 53, 56
of speech	291 <i>et seq.</i>	modern practice as to ...	55
Fugitive offenders, <i>see</i> "Extradition."		of Geo. III.	61
Functions of Government	1, 2	to places abroad	54
Fundamental law, what is ...	3	writ, purposes for which it has been used	54, 55, 56, 57
Fyrd (national levy)	168, 169	Hallam, his definition of prerogative	114
GAOL delivery, commission of	245	Hastings, impeachment of ...	256
Garret King-at-Arms	264	Haxey (freedom of speech in Parliament)	291
General court-martial	165	Henry II., his title to Crown	107
levy	168	Henry III., his title to Crown	108
warrants	26, 26, n.		

	PAGE		PAGE
Henry IV.	108, 291	House of Lords— <i>continued</i> .	
Henry V.	17, 108	its disputes with the	
Henry VI.	108	Commons 285 <i>et seq.</i>	
Henry VII.	108	its functions on an im-	
Henry VIII., his proclama-		peachment, see "Im-	
tions made law by Statute		peachment."	
of Proclamations, repealed		its power to commit for	
1st year of Edward VI. ...	15	contempt 284	
his will 108,	109	its privileges include	
Hereditary revenues 142		privileges of individual	
Heresy 65		members 282 <i>et seq.</i>	
High Court of Justice 234		Hundred's ealdor or ballivus 225	
of Parliament 251 <i>et seq.</i>			
Hobart, his views on parlia-			
mentary sovereignty 21		Idiot aliens 41	
Home Secretary 187		Idiot cannot sit in Parlia-	
Honduras 201		ment 332	
Hong Kong 201		Idiot aliens .. 41	
House of Bishops 156		Illegal practices 333	
House of Clergy 156		Immunities of High Officials	35
House of Commons, attempt		of Public Authorities, <i>see</i>	
to exercise criminal juris-		"Public Authorities	
diction 253, 254		Protection."	
committals for contempt		of Trade Union 37	
by 301 <i>et seq.</i>		Impeachment 255, 256, 257	
history of its membership 329		of President of U.S.A. ... 362	
its control over finance		Imperial Defence Committee,	
314—321		<i>see</i> "Committee of De-	
its privileges 290—302		fence."	
its procedure 322—328		Inciting of King's soldiers	
the history of legisla-		and sailors to mutiny ... 93	
tional process thereof		Income Tax 143	
304—313		Incorrigible rogue, his right	
right of impeachment ... 255		of appeal against corporal	
who may be elected to ... 329		punishment 58	
who may elect members		Indecent advertisements 67	
of 334 <i>et seq.</i>		Indemnity Acts 16	
House of Laymen 156		India Office 196	
House of Lords, its acquisi-		Indian Constitution . 354 <i>et seq.</i>	
tion of appellate jurisdic-		Indian Home Council . . 196	
tion of High Court of Par-		Infancy, Disqualification for	
liament 284		Commons, <i>see</i> "Disqualifi-	
Case of Shaftesbury 284		cation for Membership of	
effect of Parliament Act		Commons."	
on Lords 287 <i>et seq.</i>		Informal messages of King to	
		Parliament 325	

	PAGE		PAGE
Realty, wills of	318, n.	Scotland, Union of, with	
Recovery, common	229	England	377
Redress for false imprison-		Scutage or escuage	169
ment	47, 48	Seanad of Irish Free State ..	350
Referendum	217	Secretaries of State	183
Irish Free State Consti-		history of office of	183
tution	349, 351	Secretary for Home Affairs...	183,
Reform Acts	335, 336	187, 188	
conflict between Lords		Foreign	181
and Commons as to ...	286	Indian	196
Regencies	122	for Air	183
Registration of voters ..	336-340	for War	188
Requests, Court of	238	Secrets, official	94
Resolutions, Budget	22	Sedition	93
of either House not law		Self-defence	59
of land	22	Self-governing Dominions ...	202
Responsibility of Ministers to		Septennial Act	13
Parliament	174	Serjeant-at-Arms	267
their legal responsibility	174	Serjeanty, Grand	138
Responsible Government,		Petty	138
Colonies	201	Settled Colonies	199
Returning officer	262	Seychelles	201
Revenue prerogatives ...	136 <i>et seq.</i>	Sheriff	249
ordinary	136 <i>et seq.</i>	Ship Money Case	133
Revolutionary meetings	74	Sierra Leone	201
Rigid Constitutions	3, 4	Sinking Fund, New	319
Riot	76	Old	319
Riot Act	78	Slander	61
Routs	76	action for	382
Royal Assent	261	triable in County Court	239
Family	111	right to jury	382
fish	139	Slavery	54
Marriages Act	113	Soldier, status of	164, 164, n.
mines	146	Somaliland	202
prerogatives	114-144	South African Constitution...	221
Rule of law	31	South Nigeria	201
Rural dean	159	Sovereign, definition of a ...	1
		Sovereignty, Parliamentary,	
St. HELENA	202	<i>see</i> "Parliamentary Sover-	
St. Lucia	201	eignty."	
St. Vincent	201	Speaker of Lords	195
Saladin Tithe	314	of Commons	267
Scot and lot	334, 335	Stamp duties	143
Scotch Committee, <i>see</i> "Com-		Standing Army	374
mittees."		Committees	326
		Orders	311

	PAGE		PAGE
Star Chamber, Court of	25	Traverse of office	145
State, definition of a	1	Treason	88
Stateless persons	102, n.	Treason felony	92
Statute of Frauds	318, n.	Treasure trove	146
of Monopolies	26	Treasury, First Lord of	189
of <i>Præmunire</i>	53, 141	junior Lords of	191
Proclamations	15	Treaties	365
Treasons	88	Trial of peers and peeresses	282
Uses	318, n.	Tribunal <i>des conflits</i>	32
Wills	318, n.	Trover, action of	227, n.
Straits Settlements	201	Trustee, Public	192
Stubbs' Views, Origin of		Crown cannot be	148
Peerage	270	Tumultuous petitioning	74
Subinfeudation	137, n.		
Subpoena, Writ of	152	UNCONSTITUTIONAL, meaning	
Supply services	317	of word	10
Supreme Court of Judicature	234	Under-Clerk of Parliament	267
Surplus from taxes or revenue	319	Under-Secretaries	184
Surrender of nationality	101	Union Acts	377, 378
Suspending power	17	Unitary States	5
		United States Constitution	361
TALLAGE	372, 372, n.	Unlawful assembly	71
Taltarum's Case	229, n.	<i>Utrum</i> , Assize of	304 <i>et seq.</i>
Taxation, annual taxes paid			
by collectors into the Con-		VERO of King	261
solidated Fund	317	of Lords	287
must be paid out under		Vinogradoff, definition of	
statutory authority	321	League of Nations	24
Consolidated Fund ser-		Viscounts	279
vices	317	Voters, <i>see</i> "Parliamentary	
forced loans and benevo-		franchise",	334-343
lences	315		
Maltote	314	WAGER of battle	301
Prises	314	of law	227, n.
Tasks	314	Waif	140
direct	314	Walpole	116
indirect	314	War, declaration of, its	
Tenant <i>in capite</i>	269	effects	45
Tenure, barony by	272	power to declare	128
Territorial Army	176	Wards and Liveries, Court of	138
Territory, cession of	367	Ways and Means Acts	320
Torts of Crown	146	Committee of	320
Trade unions	37		
Transferred subjects, <i>see</i>			
"Indian Constitution."			

	PAGE		PAGE
Willes, view as to Parliamentary sovereignty	22	William IV.'s threat to create peers, <i>see</i> "Reform Act."	
William I., his title to the Crown	107	Wreck	139
William II., his title	107	YEAR Books	16
William III., his title under Bill of Rights, <i>see</i> "Bill of Rights."		York, Archbishop of	137
		Convocation of	155

BOOKS FOR LAW STUDENTS.

	SUBJECT INDEX.	PAGE
Admiralty -	- - - - -	4
Agency -	- - - - -	4
Arbitration -	- - - - -	4
Banking -	- - - - -	5
Bankruptcy -	- - - - -	5
Bills of Exchange -	- - - - -	6
Carriers -	- - - - -	6
Common Law -	- - - - -	7, 8, 9
Companies -	- - - - -	10
Conflict of Laws -	- - - - -	10
Constitutional Law -	- - - - -	11, 12
Contracts -	- - - - -	12, 13
Conveyancing -	- - - - -	13, 14
Criminal Law -	- - - - -	14, 15
Dictionary -	- - - - -	15
Ecclesiastical Law -	- - - - -	15
Equity -	- - - - -	16, 17
Evidence -	- - - - -	17, 18, 19
Examination Guides -	- - - - -	19, 20
Executors -	- - - - -	20
Insurance Law -	- - - - -	20
International Law -	- - - - -	21
Jurisprudence -	- - - - -	21, 22
Latin -	- - - - -	23
Legal History -	- - - - -	22
Legal Maxims -	- - - - -	23
Local Government -	- - - - -	23, 24
Master and Servant -	- - - - -	24
Mercantile Law -	- - - - -	24, 25
Mortgages -	- - - - -	25
Partnership -	- - - - -	25
Personal Property -	- - - - -	25, 26
Private International Law -	- - - - -	26
Procedure -	- - - - -	26, 27
Real Property -	- - - - -	27, 28
Receivers -	- - - - -	28
Roman Law -	- - - - -	28, 29, 30
Sale of Goods -	- - - - -	30
Statutes -	- - - - -	30, 31
Torts -	- - - - -	31
Trustees -	- - - - -	32
Wills -	- - - - -	32

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